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Raising Arizona: Reflections on Sovereignty and the Nature of the Plaintiff in Federal Suits Against States

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RAISING ARIZONA: REFLECTIONS ON SOVEREIGNTY AND THE NATURE OF THE PLAINTIFF IN FEDERAL SUITS AGAINST STATES

Catherine T. Struve*

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INTRODUCTION

When the Supreme Court last Term handed down a trio of decisions on state sovereign immunity¹ it provoked an immediate outcry. Justice Stevens, speaking in dissent, reportedly “accused the majority of constructing a doctrine of sovereign immunity ‘much like a mindless dragon that indiscriminately chews gaping holes in Federal statutes,’” and warned that “the Court was returning to ‘the brief period of confusion and crisis when our new nation was governed by the Articles of Confederation.’”² Many commentators echoed his concerns.³ And while the direct, practical effects of the decisions

1. See *Alden v. Maine*, 119 S. Ct. 2240 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999).

2. Linda Greenhouse, *The Supreme Court: Federalism; States Are Given New Legal Shield by Supreme Court*, N.Y. TIMES, June 24, 1999, at A1 (noting that this language—from Justice Stevens’ oral rebuttal—did not appear in his written dissent).

3. See, e.g., *In 3 Decisions, Divided Court Strengthens States’ Rights*, STAR TRIBUNE, June 24, 1999, at 17A (quoting Professor Chemerinsky as stating that the decisions are “a radical change in American government” and that “the states can violate federal law with impunity, and nowhere can they be sued for damages in a federal or state court”); David G. Savage, *High Court’s Conservatives Change Balance of Power*, L.A. TIMES, June 26, 1999, at A1 (quoting Professor Tribe as saying that “Activism

are far-reaching,⁴ their reasoning is likely to have yet broader influence.

In *Alden v. Maine*, a majority of the Court announced that state sovereign immunity is a freestanding constitutional doctrine⁵ that ranks with guarantees such as “the right to trial by jury and the prohibition on unreasonable searches and seizures.”⁶ By embracing state sovereign immunity as a constitutionally protected right independent of the Eleventh Amendment,⁷ the Court gave itself license to determine

doesn't even describe these holdings. They are extraordinary.”); *but see, e.g.*, Kathleen M. Sullivan, Editorial, *Federal Power, Undimmed*, N.Y. TIMES, June 27, 1999, at 17 (“Some of the reaction [to the decisions] has been hyperbolic.”).

4. In *Alden*, the Court held that Congress's Article I powers do not permit it to authorize private damages actions against states in their own courts. *See Alden*, 119 S. Ct. at 2266. In *College Savings Bank*, the Court upheld the dismissal of a suit under the Lanham Act on the grounds that (1) Congress could not abrogate state immunity from claims under the Lanham Act for false advertising because such claims did not implicate property interests protected under the Fourteenth Amendment and (2) state sovereign immunity cannot be constructively waived. *See College Sav. Bank*, 119 S. Ct. at 2225, 2228. In *Florida Prepaid*, finally, the Court held invalid Congress's abrogation of state immunity from patent infringement claims on the ground that it had not been shown that the abrogation was necessary to remedy or prevent state violations of patent holders' Fourteenth Amendment property interests. *See Florida Prepaid*, 119 S. Ct. at 2207, 2209-10.

Taken together, these decisions (1) reaffirm that Congress may not abrogate state sovereign immunity under its Article I powers; (2) demonstrate that the Court will scrutinize narrowly any attempt at abrogation pursuant to Congress's enforcement powers under the Fourteenth Amendment; (3) foreclose the possibility that a private litigant might escape the Court's sovereign immunity doctrines by suing in state court; and (4) sound the death knell for the doctrine of constructive waiver.

5. *See Alden*, 119 S. Ct. at 2246 (“[T]he sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment.”).

6. *Id.* at 2256; *see also id.* at 2246-47 (arguing that “the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments”); *compare id.* at 2270 n.1 (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ., dissenting) (noting that in contrast to the rights to jury trials and to freedom from unreasonable searches and seizures, “the general prerogative of sovereign immunity appears nowhere in the Constitution”).

7. Some opinions prior to *Alden* had indicated that, in addition to the Eleventh Amendment, more obscure constitutional principles of state sovereign immunity also limited federal jurisdiction. *See, e.g.*, *Nevada v. Hall*, 440 U.S. 410, 441 n.5 (1979) (Rehnquist, J., joined by Burger, C.J., dissenting) (adverting to “contexts in which this Court has invoked the constitutional plan to find a State was not amenable to an unconsented suit despite the absence of express protection in the Constitution”); *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (refusing to “assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States”); *In re New York*, 256 U.S. 490, 497 (1921) (stating that unconsented suits against a state by its own citizens are barred by “the fundamental rule of which the amendment is but an exemplification”). *Alden*, however, broadens that protection yet

questions of state immunity by reference to the system of federalism as a whole, unconstrained by the text or history of the Amendment.⁸ Accordingly, the Court supported its holding in *Alden* by referring to the views that prevailed at the time of the Constitution's framing, to background principles of English and colonial law, to subsequent congressional and judicial perspectives, and to the competing interests accommodated by the federal system.⁹

In practical terms, the latter consideration appears to have carried the day, for at its core *Alden* concerns the allocation of power, both between state and federal governments and within the federal government. *Alden* invokes the Framers' "insight that freedom is enhanced by the creation of two governments, not one."¹⁰ While "Congress has ample means to ensure compliance with valid federal laws, . . . it must respect the sovereignty of the States."¹¹ In addition, *Alden* posits that the separation of powers within the federal government helps to protect state sovereignty: though Congress can enact laws that bind the states, Congress generally¹² cannot authorize damages actions by private individuals to enforce those laws against the states.¹³ Instead, in most circumstances such damages actions must be brought by the United States itself—a rule that not

further by extending its reach to state courts. See Bernard James, *The States' Rights Cases Provoke Fire*, NATIONAL LAW JOURNAL, August 16, 1999, at B10 ("With the cases of the 1999 term . . . the justices have extended the immunity of states beyond a mere limit on federal judicial power into a natural and indigenous right of sovereignty with an uncertain scope.").

8. However, the *Alden* majority maintained that its vision of the federal structure implements the intent of the Constitution's Framers and ratifiers. See *infra* note 94.

9. See Part I.B. below.

10. *Alden*, 119 S. Ct. at 2268; but see Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1463 (1995) ("In our modern regulatory state, two layers of government seem as likely to impose double as to impose half the burdens that a single layer of government would impose.").

11. *Alden*, 119 S. Ct. at 2268.

12. For exceptions, see Part I.A. below.

13. The dissenting members of the Court observed, however, that removing Congress's power to authorize private suits against States would have the effect of centralizing federal enforcement efforts against states. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2240 (1999) (Breyer, J., joined by Stevens, Souter and Ginsburg, JJ., dissenting) (noting that forcing Congress to "create a federal damages-collecting 'enforcement' bureaucracy charged with responsibilities that Congress would prefer to place in the hands of States or private citizens . . . makes it more difficult for Congress to decentralize governmental decisionmaking and to provide individual citizens, or local communities, with a variety of enforcement powers").

only forces the federal government to allocate scarce resources to fund such suits, but also requires the Executive branch to take political responsibility for the litigation.¹⁴

The Court's recent proscription of most private suits against states will force a closer examination of what counts as a suit by the United States¹⁵—a question that is currently the subject of vigorous debate in the context of *qui tam* suits against states. The *qui tam* device permits private persons to sue third parties—on their own behalf and that of the federal government—and to share the resulting recovery with the United States.¹⁶ Recently, five Circuits have been asked to decide whether private *qui tam* plaintiffs can bring such a suit against an unconsenting state in the absence of the federal government. Four Circuits have said yes; one has said no; and the Supreme Court granted certiorari to review the judgment of one of the four.¹⁷ If the Court reaches the sovereign immunity question, and if a majority of the Court applies the *Alden* analysis, it appears likely that the immunity analysis will turn largely on the United States' participation in, responsibility for, and ability to control the litigation. Because *qui tam* suits in which the United States does not intervene fail to meet the *Alden* Court's "rule"¹⁸ that the National Government must itself deem the case of sufficient importance to take action against the State,¹⁹ it appears probable that the Court would conclude that states are immune from suits pressed solely by *qui tam*

14. See *Alden*, 119 S. Ct. at 2269.

15. See Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 93-94 (1999) [hereinafter Caminker, *State Immunity Waivers*] (noting the Supreme Court's view that, as part of the constitutional plan, states waived sovereign immunity from suits brought by the United States, and observing that "[s]ince the Court has severely curtailed congressional authority to abrogate state sovereign immunity and has made specific consent to suit more difficult to prove, the ultimate scope of state sovereign immunity turns in significant part on the scope of this 'plan waiver' for United States suits").

16. See Part II below.

17. See *infra* notes [97-100] and accompanying text.

18. This "rule" is dictum, at least insofar as it would extend to *qui tam* suits against states. See Caminker, *State Immunity Waivers*, *supra* note 15, at 120 n.126 (observing that in *Alden* "the Court was illustrating a distinction between conventional private suits to enforce private rights under the Fair Labor Standards Act and conventional government-initiated suits brought by the Secretary of Labor. There was no argument that the private plaintiffs were asserting any sovereign legal interests, indeed, any interests other than their own personal ones; and thus there was no occasion for the Court to consider the relevance, if any, of the form of litigation brought on behalf of the United States.").

19. *Alden*, 119 S. Ct. at 2269.

plaintiffs.²⁰

Alden's influence, however, will extend beyond cases in which the United States fails to take an active part. Questions concerning the United States' role—and the implications of that role for state sovereign immunity—can also arise when the United States itself litigates a claim against a state. In particular, one doctrine that merits reexamination in the light of *Alden* concerns litigation pressed jointly by the United States and an Indian tribe.²¹ Though the Eleventh Amendment applies to damages suits against states by Indian tribes,²² the federal government, in fulfillment of its trust obligations to Indian tribes, can sue a state for damages on a tribe's behalf.²³ In *Arizona v. California*,²⁴ moreover, the Court held that Indian tribes can intervene in an action in which the United States asserts claims on their behalf, and can participate actively and independently in the litigation of the case.²⁵ The *Arizona* Court recognized the importance of tribal participation in such lawsuits as a means of involving Indian tribes in the determination of their rights.²⁶ In fact, the *Arizona* doctrine has come into increasing use in recent years as tribal litigants, and the United States, assert claims against states for violations of federal law.²⁷ In a post-*Alden* world, however, *Arizona's* usefulness might at first seem a point of vulnerability: to the extent that *Arizona* intervention permits an Indian tribe to affect the outcome of litigation, states'-rights advocates might contend that *Arizona* offends *Alden's* notions of federal accountability and control. Indeed, the tribes in *Arizona* were

20. See generally Part II below.

21. "Indian tribe" has long been a term of art in federal law. Accordingly, since this Article examines historical interactions between Native American governments and the federal system, it refers to such governments as "Indian tribes" or "Indian nations." Cf. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 679 (1989) ("Using the words 'Indian tribes' . . . underscores the distinct political experiences of Indian tribes . . .").

22. See *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991).

23. See Parts IV.A.1. and IV.A.2. below.

24. 460 U.S. 605 (1983).

25. See Part III.A. below.

26. See *Arizona*, 460 U.S. at 615.

27. See *Cayuga Indian Nation v. Cuomo*, Nos. 80-CV-930 & 80-CV-960, 1999 WL 509442, at *13 (N.D.N.Y. July 1, 1999); *Seneca Nation v. New York*, 26 F. Supp.2d 555, 563-65 (W.D.N.Y. 1998), *aff'd per curiam*, 178 F.3d 95 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 785 (2000); *Seneca Nation v. New York*, No. 93-CV-688A, slip op. at 7-9 (W.D.N.Y. Aug. 18, 1998) (Mag. J. op.), *adopted*, *Seneca Nation v. New York*, No. 93-CV-688A, slip op. at 2 (W.D.N.Y. Nov. 3, 1998); *United States v. Idaho*, No. CV 94-0328, slip op. at 8-10 (D. Idaho Nov. 9, 1995).

granted leave to intervene precisely because they had something to gain, and something to contribute, through their participation in the suit—in short, because their positions differed in pertinent respects from those taken by the United States.

As shown below, any apparent tension resolves itself upon closer analysis. This Article examines *Arizona* intervention through the lens of *Alden*'s federal-private plaintiff distinction and concludes that, even under the Court's current expansive view of state immunity, *Arizona* intervention is amply justified. Part I of the Article reviews the Court's recent treatments of state sovereign immunity and describes *Alden*'s focus on the differences between suits by private litigants and suits by the United States. Part II, using *qui tam* suits as an example, discusses the likely doctrinal effect of the *Alden* Court's emphasis on federal participation in and control of suits against states. Part III posits that the *Arizona* Court approved the use of tribal intervention specifically in order to supplement—and sometimes contradict—the positions taken by the United States and notes that none of the Court's subsequent decisions have called this approval into doubt. Part IV argues that despite *Alden*'s emphasis on federal control, the *Arizona* doctrine provides a permissible, and necessary, avenue for tribal participation in United States suits against states. Part V, finally, examines practical questions likely to arise from *Arizona* intervention.

As the above summary suggests, this Article has a deliberately narrow focus. It does not address competing theories of the Eleventh Amendment;²⁸ nor does it canvass the

28. The "diversity" theory, for example, holds that the Amendment was intended merely to remove diversity jurisdiction as a basis for suing a state in federal court; under this interpretation, states could still be sued by individuals in federal court on other bases—for instance in federal question cases. See, e.g., *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 652-53 (2000) (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting in part); *Seminole Tribe v. Florida*, 517 U.S. 44, 101-02 (1996) (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 286-87 (1985) (Brennan, J., joined by Marshall, Blackmun and Stevens, JJ., dissenting); Edward Hartnett, *A "Uniform and Entire" Constitution; Or, What if Madison Had Won?*, 15 CONST. COMMENT. 251, 265 (1998); Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 544 (1997); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 13, 19; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1474-75 (1987); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 67-68 (1984); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1035 (1983); John J. Gibbons, *The Eleventh*

weaknesses in the *Alden* Court's analysis.²⁹ Instead, it accepts the Court's broad view of state sovereign immunity as a constitutional principle and approaches *Arizona* intervention from that standpoint. Similarly, in assessing the federalism issues raised by *Arizona* intervention, this Article refers to principles of federal Indian law without extensive examination of their origin. Such uncritical use is generally inadvisable, given the grim history of this nation's dealings with Native Americans.³⁰ But since the Court's current vision of state

Amendment and State Sovereign Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889, 1937-38 & n.257 (1983). A recent refinement of this theory argues that the Amendment was intended to eliminate "party-based jurisdiction as a potential vehicle for the judicial enforcement of old state debts" incurred before the Constitution took effect. See James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1277-78 (1998).

Another approach—the common-law theory—maintains that the Amendment was intended to make clear that federal jurisdiction over suits by citizens of one state against another state was not constitutionally required; in this view, the Amendment's purpose was merely "to allow sovereign immunity to survive as a common law requirement," but not to foreclose the possibility of congressional or judicial modification of the doctrine. See Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 543 (1977). Similarly, proponents of the "abrogation" theory believe the Amendment to limit only the power of the courts, leaving Congress free to curb the states' immunity. See Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 693-95 (1976); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1468-69 (1975). A literalist interpretation, finally, would bar all suits against a state by citizens of another state or citizens or subjects of foreign states (no matter whether the claim involves a federal question or not) but not suits by other sorts of plaintiffs. See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1371 (1989); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 65 (1989).

29. See, e.g., *Alden*, 119 S. Ct. at 2269 (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ., dissenting); Charles Fried, Editorial, *Supreme Court Folly*, N.Y. TIMES, July 6, 1999, at A17 (describing the Court's opinions in *Alden*, *College Savings Bank* and *Florida Prepaid* as "nothing short of bizarre").

30. Professor Frickey has observed that "[t]he history of federal Indian law . . . has been filled with tragedy, a story in which the rule of law often has become a vehicle to rationalize what can only be understood as crimes against humanity." Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 427 (1993); see also Resnik, *supra* note 21, at 696 (noting that in contrast to the usual sources of federal power, "other, often unspoken rationales—conquest, violence, force—are the primary sources of the power exercised by the federal government over Indian tribes"); see, e.g., *Worcester v. Georgia*, 31 U.S. 515, 543 (1832) ("[P]ower, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend."). Thus, "unless injected with a heavy dose of historical perspective and legal realism, formal lawyerly analysis not only fails to illuminate the issues in federal Indian law, but can also result in deceiving conclusions." Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754,

sovereign immunity focuses on the structure of the federal system as conceived by the Framers, the application of that vision to tribal claims asks how federal law views Indian tribes within the federal system—even if that view may be doctrinally flawed. Within these constraints, this Article examines how *Arizona* intervention should fare under the Court's present analysis of state sovereign immunity, and it is with the latter that the inquiry properly begins.

I. THE COURT'S CURRENT VIEW OF STATE SOVEREIGN IMMUNITY

The Eleventh Amendment's text, as commentators frequently note³¹ and courts are constrained to admit,³² provides only that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."³³ Notwithstanding, the Supreme Court has interpreted the Amendment—or its penumbra³⁴—to bar a number of other kinds of suits, including suits against a state by its own citizens,³⁵

1757 (1997); see also Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 301-02 (1993).

31. See, e.g., Martin H. Redish, *Constitutionalizing Federalism: A Foundational Analysis*, 23 OHIO N.U. L. REV. 1237, 1266 (1997) ("Once one abandons the constraints imposed by the confused and misguided federalism theory that has puzzlingly grown up around the Eleventh Amendment, one is restrained only by the narrow contours of the provision's text."); Shapiro, *supra* note 28, at 67 ("The language of the eleventh amendment does not include the term 'sovereign immunity' or anything resembling it.").

32. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (conceding that "the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts").

33. U.S. CONST. amend. XI.

34. See, e.g., *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . ."). One commentator has remarked that the Supreme Court's Eleventh Amendment jurisprudence "involves a sort of penumbral reasoning: notwithstanding that there is nothing in the Eleventh Amendment to bar suits not in law or equity or suits brought by a state's own citizens from the federal courts, the Supreme Court has consistently found that such suits are barred by general doctrines of federalism and state sovereignty that are inherent in the constitutional plan, though not present anywhere in the constitutional context." Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1341 (1992); see also, e.g., Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 219 n.12 (1995) ("To give sovereign immunity some life . . . the Supreme Court has basically ignored the Amendment's language and construed the Amendment as embodying or exemplifying the concept of state sovereign immunity.").

35. See *Hans v. Louisiana*, 134 U.S. 1, 4, 21 (1890) (holding that a state cannot be

suits against a state by a foreign state³⁶ and suits against a state by an Indian tribe.³⁷

Until recently, it seemed that there existed a range of circumstances under which private plaintiffs could nonetheless sue a state. State officers could be sued for injunctive relief pursuant to the doctrine of *Ex parte Young*,³⁸ and states themselves could be sued under federal statutes that abrogated state sovereign immunity.³⁹ States could, of course, explicitly consent to suit,⁴⁰ and it also appeared possible—albeit unlikely—that under certain very narrow circumstances a state could be found to have constructively waived immunity to suit.⁴¹ Moreover, since the Eleventh Amendment speaks only to “[t]he Judicial power of the United States,” some posited that state sovereign immunity was simply a principle of forum allocation which provided that states could not be sued without their consent in *federal* court; under this view, plaintiffs could sue states in *state* court without offending any federal constitutional principle.⁴²

sued on a federal claim in federal circuit court by one of its citizens); *see also* Shapiro, *supra* note 28, at 71 n.56 (noting, but disagreeing with, the argument that *Hans* “f[ell] short of constitutionalizing sovereign immunity”).

36. *See* *Monaco v. Mississippi*, 292 U.S. 313, 329-30 (1934).

37. *See Blatchford*, 501 U.S. at 779, 782.

38. 209 U.S. 123 (1908). Under *Ex parte Young*, the Court has recognized an exception to Eleventh Amendment immunity “for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities.” *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 269 (1997).

39. *See* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-14 (1989) (plurality opinion); *id.* at 57 (White, J., concurring in judgment in part) (agreeing with the plurality “that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States” but expressing disagreement “with much of [the plurality’s] reasoning”); *see also* *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (overruling *Union Gas*).

40. *See, e.g.,* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985) (noting the “well-established” principle that “if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action”).

41. *See* *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 363 (3d Cir. 1997) (positing, though not deciding, that “a state’s Eleventh Amendment immunity can be constructively waived if: (1) Congress enacts a law providing that a state will be deemed to have waived its Eleventh Amendment immunity if it engages in the activity covered by the federal legislation; (2) the law does so through a clear statement that gives notice to the states; (3) a state then engages in that activity . . . ; and (4) the activity in question is not an important or core government function”), *aff’d on other grounds*, 119 S. Ct. 2219 (1999); Note, *Reconceptualizing the Role of Constructive Waiver After Seminole*, 112 HARV. L. REV. 1759, 1769 (1999) (arguing that “constructive waiver represents a feasible means of fostering state accountability for violating federal law within the bounds of the Court’s Eleventh Amendment jurisprudence”).

42. *See* Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106

Within the past few years, however, the Court has narrowed or eliminated all these avenues except for those held open by *Ex parte Young*⁴³ and the doctrine of explicit state consent.⁴⁴ While

YALE L.J. 1683, 1690, 1708-14 (1997) (reviewing cases that support a forum-allocation theory but noting the possibility "that a state may avoid the exercise of federal judicial power simply by refusing to consent to a suit against it in its own courts").

43. Professor Vicki Jackson has pointed out that the Court's analysis in *Seminole Tribe* may portend a narrowing of the availability of relief under the doctrine of *Ex parte Young*. See Jackson, *supra* note 28, at 498. Indeed, in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), decided shortly after *Seminole Tribe*, the Court once more refused to apply the *Ex parte Young* doctrine. See Jackson, *supra* note 28, at 546 (noting that the Court "twice in two Terms denied apparently prospective relief against state officers to vindicate federal law.") But the holding in *Coeur d'Alene Tribe*, at any rate, is unlikely to extend beyond its specific facts. See *id.* (noting that "*Coeur d'Alene's* reasoning may be limited to its particular context").

In *Coeur d'Alene Tribe*, the Court rejected an attempt by an Indian tribe and certain of its members (collectively the "Tribe") to use the *Ex parte Young* doctrine to sue a state in federal court to assert a beneficial interest in, aboriginal title to and the right to possess the banks and submerged lands of Lake Coeur d'Alene. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 264-65, 287-88.

In addition to the relief detailed above, the *Coeur d'Alene Tribe* plaintiffs also sought an order enjoining the defendants "from regulating, permitting or taking any action in violation of" the Tribe's ownership interests in the land. *Id.* at 265. The Court concluded that the relief sought was "close to the functional equivalent of quiet title in that substantially all the benefits of ownership and control would shift from the State to the Tribe" and was "far-reaching and invasive" because it would entail "a determination that the lands in question are not even within the regulatory jurisdiction of the State." *Id.* at 282. Moreover, the Court stated, "lands underlying navigable waters have historically been considered sovereign lands [and] [s]tate ownership of them has been considered an essential attribute of sovereignty." *Id.* at 283 (internal quotation marks omitted). Accordingly, the Court concluded that "[u]nder these particular and special circumstances," the Eleventh Amendment barred relief against the state officials because otherwise "Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 287.

Even aside from the fact that the five-Justice majority could not agree how to determine the applicability of *Ex parte Young*, compare 521 U.S. at 278-80 (Kennedy, J., joined by Rehnquist, C.J.) (advocating case-by-case analysis), with *id.* at 296 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment) (criticizing Justice Kennedy's "vague balancing test"), *Coeur d'Alene Tribe's* holding is a narrow one. Three members of the majority noted that in an ordinary case concerning "ownership and possession of an ordinary parcel of real property," a court could permissibly "find that the [state] officials had no right to remain in possession, thus conveying all the incidents of ownership to the plaintiff, while not formally divesting the State of its title," but contrasted the *Coeur d'Alene Tribe* case, where "the Tribe seeks a declaration not only that the State does not own the bed of Lake Coeur d'Alene, but also that the lands are not within the State's sovereign jurisdiction." *Id.* at 290-91.

44. See, e.g., *Alden v. Maine*, 119 S. Ct. 2240, 2258 (1999) ("[W]e have not questioned the general proposition that a State may waive its sovereign immunity and consent to suit . . ."). Under the Court's most recent decisions, moreover, Congress retains some power to elicit such waivers, for instance by conditioning the grant of federal funds on state consent to suit, see *id.* at 2267 (noting that "subject to constitutional limitations" the federal government may "seek the States' voluntary

the Court's recent rulings have obvious impact on private suits against states, they also indicate the general approach favored by a majority of the current Court in weighing questions of state sovereign immunity.

A. The Court's Recent Decisions

In terms of practical effect, the core of the Court's recent holdings is that Congress cannot abrogate state sovereign immunity under its Article I powers.⁴⁵ This view impels, not only the Court's decisions with respect to abrogation of immunity from suit in federal court, but also its holdings regarding suits against states in state court and concerning constructive waivers of state sovereign immunity.

In *Seminole Tribe v. Florida*,⁴⁶ the Court held that the Indian Commerce Clause⁴⁷ does not grant Congress the power to abrogate state sovereign immunity.⁴⁸ Since the Court conceded that "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause,"⁴⁹ the Court's holding required it to overrule the teaching of *Pennsylvania v. Union Gas Co.*⁵⁰ that Congress can abrogate state sovereign immunity pursuant to the Interstate Commerce Clause.⁵¹ Leaving no doubt as to the breadth of its view, the Court stated flatly that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."⁵²

consent to private suits"), though the Court has indicated that Congress cannot make such consent a condition of state participation in "otherwise permissible activity," see *College Sav. Bank*, 119 S. Ct. at 2231 (stating that "the point of coercion is automatically passed—and the voluntariness of waiver [of state sovereign immunity] destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity" rather than the denial of federal funds).

45. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 643 (2000) (noting that *Seminole Tribe* "held that Congress lacks power under Article I to abrogate the States' sovereign immunity" and that the Court's decisions in *College Savings Bank*, *Florida Prepaid* and *Alden* "reaffirmed that central holding of *Seminole Tribe*").

46. 517 U.S. 44 (1996).

47. U.S. CONST., art. I, § 8, cl.3.

48. *Seminole Tribe*, 517 U.S. at 72-73.

49. *Id.* at 62.

50. 491 U.S. 1 (1989); see also *supra* note 39.

51. See *Seminole Tribe*, 517 U.S. at 66 (overruling *Union Gas*).

52. *Seminole Tribe*, 517 U.S. at 72-73; see also, e.g., *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2205 (1999) ("*Seminole Tribe*

Of course, *Seminole Tribe* did not strip Congress of all power to abrogate state immunity; so long as Congress makes its intent clear,⁵³ it may still authorize a private damages suit against a state “in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance.”⁵⁴ However, the Court stressed in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*⁵⁵ that this power extends only to “the carefully delimited remediation or prevention of constitutional violations.”⁵⁶ Thus, for example, legislation to enforce the Fourteenth Amendment’s guarantee of procedural due process must meet certain strict requirements. Congress can validly abrogate state sovereign immunity if such abrogation is necessary to remedy or prevent state deprivations (without due process) of property rights protected by the Fourteenth Amendment;⁵⁷ but the Court has indicated that it will construe narrowly what constitutes such a protected property right. A federal statute prohibiting false advertising, for example, does not protect a Fourteenth Amendment property right: “business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense,”⁵⁸ since it does not encompass the right to exclude others, which is “[t]he hallmark of a protected property interest.”⁵⁹ Moreover, even when legislating to safeguard a protected property interest such as trademarks⁶⁰ or patents, Congress cannot abrogate state sovereign immunity unless it identifies state violations of substantive Fourteenth Amendment rights and “tailor[s] its

makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers”).

53. See, e.g., *Florida Prepaid*, 119 S. Ct. at 2205 (valid abrogation requires both that “Congress has ‘unequivocally expresse[d] its intent to abrogate . . .’” and that Congress has “acted ‘pursuant to a valid exercise of power’”) (quoting *Seminole Tribe*, 517 U.S. at 55).

54. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2223 (1999).

55. 119 S. Ct. 2219 (1999).

56. *Id.* at 2224 (citing U.S. CONST. amend. XIV, § 5).

57. See *id.* at 2224-25.

58. *Id.* at 2225.

59. *Id.* at 2224.

60. See *id.* (“The Lanham Act may well contain provisions that protect constitutionally cognizable property interests—notably, its provisions dealing with infringement of trademarks, which are the ‘property’ of the owner because he can exclude others from using them.”).

legislative scheme to remedying or preventing such conduct.⁶¹ Thus, the Court held in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*⁶² that Congress's amendment of the patent laws expressly to abrogate state sovereign immunity from patent infringement claims was invalid because Congress had neither identified a pattern of patent infringement by states nor found that states deprived patentees of state remedies for such state infringement.⁶³ While this analysis does suggest that if states took *Florida Prepaid* as a "license . . . to lower the Stars and Stripes and raise the Jolly Roger"⁶⁴ the resulting pattern of unremedied infringement could then provide a basis for abrogation, the Court's approach sets a high bar.⁶⁵

Similarly, the Court's view of Congress's abrogation powers recently cemented its rejection of the doctrine of constructive waiver. Although the Court had held in *Parden v. Terminal Railway of Alabama State Docks Department*⁶⁶ that a state could constructively waive its immunity from suit by choosing to engage in an interstate commerce activity regulated by federal legislation,⁶⁷ the retreat from this holding had begun even before *Seminole Tribe*.⁶⁸ In *College Savings Bank*, the Court "drop[ped]

61. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2207 (1999). The Court's examples of "limits" that might render legislation more acceptable, e.g., "providing for suits only against States with questionable remedies or a high incidence of infringement," *id.* at 2210, raise a number of questions, not least of which is administrability. These issues, however, fall outside the scope of this Article.

62. 119 S. Ct. 2199 (1999).

63. *See id.* at 2207, 2209-10.

64. Peter A. Roberts (the owner of the patent at issue in *Florida Prepaid*), quoted in Sabra Chartrand, *Patents*, N.Y. TIMES, June 28, 1999, at C12.

65. The decision this Term in *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), demonstrates that the Court will apply a similarly restrictive analysis to determine whether Congress has legislated pursuant to its power to enforce the Equal Protection Clause of the Fourteenth Amendment. *See* 120 S. Ct. at 650 (holding that the Age Discrimination in Employment Act of 1967 is not a valid exercise of Congress's § 5 enforcement power, "[i]n light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States").

66. 377 U.S. 184 (1964).

67. *See id.* at 192 (holding that a state's choice to operate an interstate railroad after the enactment of the Federal Employers' Liability Act constituted consent to suit under that Act).

68. *See Employees of Dep't of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 284-85 (1973) (distinguishing *Parden* on the grounds that the Fair Labor Standards Act (the statute at issue in *Employees*) did not clearly express an intent to remove the states' immunity and that the state activity in *Parden* "was in the area where private persons and corporations normally ran the enterprise"); *Edelman v. Jordan*, 415 U.S. 651, 672-73 (1974) (holding that in *Edelman* congressional

the other shoe" and held that "[w]hatever may remain of our decision in *Parden* is expressly overruled."⁶⁹ Although the Court noted *Parden's* conflict with the requirement that express waivers of state sovereign immunity be unequivocal,⁷⁰ it also relied heavily upon the restrictions on Congress's ability to abrogate. As the Court explained, "Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would . . . , as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*."⁷¹

In *Alden v. Maine*, finally, the Court held that Congress lacks the power under Article I to authorize private damages actions against states in their own courts.⁷² As a practical matter, *Alden* rounds out the set of cases that now precludes most private damages suits against states; after *Alden*, it appears that private plaintiffs suing alone may only sue a state for damages if the state has consented to suit or Congress has abrogated state immunity pursuant to a valid exercise of its Fourteenth Amendment enforcement powers. Additionally, in a broader sense, *Alden* illustrates the Court's current doctrinal approach.

B. *Alden and the Court's Theoretical Approach*

Alden's analysis proceeds along two lines, one formal and one functional. The formal analysis examines a number of factors, which may balance differently in different contexts and not all of which will necessarily shed light on a given question of state immunity. The functional⁷³ analysis is simpler and more

authorization to sue states was "wholly absent," but also noting that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights"); *Welch v. Texas Dep't of Hwys. & Public Transp.*, 483 U.S. 468, 478 (1987) (plurality opinion) ("[T]o the extent that *Parden v. Terminal Railway* . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled."); *id.* at 496 (Scalia, J., concurring in part and concurring in the judgment) (arguing that as a matter of statutory construction the Jones Act and the FELA should not be read to apply to states).

69. *College Sav. Bank*, 119 S. Ct. at 2228.

70. *See id.* at 2228.

71. *Id.* at 2229.

72. *See Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999).

73. As will be seen, the *Alden* Court's functional analysis is limited in important ways. When the Court examines the effect that a particular kind of suit against a state will have on the balance of power in the federal system, it does so in order to determine whether the states consented to such a suit when they agreed to enter the Union—an

pragmatic, and potentially more universal, for it asks whether the type of suit at issue accords with the Court's view of the basic balance struck by the federal system.

1. *The formal analysis*

The bulk of the majority opinion in *Alden* attempts to support the Court's holding by resorting to "the Constitution's structure, and its history, and the authoritative interpretations by this Court."⁷⁴ Thus, *Alden* illustrates that the Court will look to certain discrete factors—relevant provisions of the Constitution; the pronouncements of the Framers and their contemporaries; background principles of English law; and subsequent congressional and judicial perspectives—to inform its discussion of state immunity.

In *Alden*, the Court opened with an examination of the Constitution itself. The Court contrasted "[v]arious textual provisions of the Constitution [that] assume the States' continued existence and active participation in the fundamental processes of governance" with "[t]he limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government."⁷⁵ To complete the picture, the Court noted "the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power."⁷⁶

The Court then proceeded to survey the views of "[t]he generation that designed and adopted our federal system," in

inquiry that is generally non-normative and often somewhat artificial. See, e.g., *Alden*, 119 S. Ct. at 2268-69. To the extent that the Court confines itself to this analysis and eschews any inquiry into whether the effects of the suit at issue are otherwise desirable, its approach can rightly be criticized as formalistic. See Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 969 (1997) (arguing that the Court's recent federalism decisions are "formalistic in the classic sense" in that "[t]he Court has emphasized deductive reasoning from asserted premises and has refused to give weight to functional considerations, whether based on public policy needs . . . or constitutional values"). This Article, however, uses the term "functional" for convenience in contrasting the Court's semi-functional approach with its more "formal" inquiry into discrete historical and judicial precedents.

More broadly, both the formal and functional analyses in *Alden* can be described as originalist—insofar as they reflect the Court's "focus on the Framers' original views," Caminker, *State Immunity Waivers*, *supra* note 15, at 112—or "reconstructionalist"—to the extent that they seek to "reconstruct[] the most plausible agreement [among the Framers] rather than interpret[] conventional historical indicia thereof," *id.* at 113. See *infra* note 94.

74. *Alden*, 119 S. Ct. at 2246.

75. *Id.* at 2247.

76. *Id.*

order to support the argument that the Framers “considered immunity from private suits central to sovereign dignity.”⁷⁷ Thus, the Court in *Alden* cited authorities from English law, the ratification debates and documents and the Federalist Papers.⁷⁸ In addition, the Court turned to the lore of *Chisholm v. Georgia*⁷⁹ and the “text and history” of the Eleventh Amendment for further evidence of contemporary or near-contemporary views.⁸⁰

Next, the Court examined its own precedents and past congressional practices. In the Court’s view, Congress’s actions constitute a tacit acknowledgment of state immunity in that “[n]ot only were statutes purporting to authorize private suits against nonconsenting States in state courts not enacted by early Congresses, statutes purporting to authorize such suits in any forum are all but absent from our historical experience.”⁸¹ Similarly, the Court maintained, based on evidence such as the “sweeping terms” with which prior decisions describe state immunity, that “[t]he theory and reasoning of our earlier cases suggest the States do retain a constitutional immunity from suit in their own courts.”⁸² Finally, the Court measured the question at hand against values that state sovereign immunity is traditionally thought to promote—state dignity,⁸³ state finances⁸⁴ and the integrity of state governmental processes.⁸⁵

2. *The functional analysis*

Having examined various discrete sources of information that might pertain to the question of state immunity, the *Alden* Court turned to a discussion of the balance of powers within the federal system. This part of the Court’s analysis centered on the nature of the plaintiff.

The Court explained in *Alden* that “[a] suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to ‘take Care that the Laws be faithfully

77. *Id.*

78. *See Alden v. Maine*, 119 S. Ct. 2240, 2247-49 (1999).

79. 2 U.S. 419 (1793).

80. *See Alden*, 119 S. Ct. at 2249-53, 2260-61.

81. *Id.* at 2261.

82. *Id.* at 2262.

83. *See id.* at 2263-64.

84. *See id.* at 2264.

85. *See id.* at 2264-65.

executed,' U.S. Const., Art. II, § 3, differs in kind from the suit of an individual"⁸⁶—an admonition which echoes the Court's 1991 opinion in *Blatchford v. Native Village of Noatak*.⁸⁷ In *Blatchford*, the plaintiffs contended, *inter alia*, that 28 U.S.C. § 1362, which governs federal jurisdiction over federal claims by Indian tribes, represented "a delegation to tribes of the Federal Government's exemption from state sovereign immunity."⁸⁸ The Court, while rejecting this argument on grounds of statutory construction,⁸⁹ expressed its "doubt" that such exemption "can be delegated—even if one limits the permissibility of delegation . . . to persons on whose behalf the United States itself might sue."⁹⁰ As the Court saw it,

[t]he consent, "inherent in the convention," to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.⁹¹

In *Alden*, the Court expanded upon the differences—with respect to state sovereign immunity—between suits by the federal government and private suits. *First*, "[w]hile the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures, the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity."⁹² *Second*, "[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."⁹³ *Third*, a suit by the federal government by definition satisfies the "rule that the National Government must itself deem the case of sufficient importance to take action against the

86. *Alden*, 119 S. Ct. at 2267.

87. 501 U.S. 775 (1991).

88. *Id.* at 785.

89. The Court held that there was no evidence that Congress intended § 1362 to abrogate state sovereign immunity from suits by Indian tribes. *See Blatchford*, 501 U.S. at 785-86.

90. *Id.*

91. *Id.*

92. *Alden*, 119 S. Ct. at 2267.

93. *Id.*

State.”⁹⁴

94. *Id.* at 2269. In a recent article, Professor Evan Caminker argues that the Court's emphasis on whether the United States itself litigates the claim against the state is at odds with the Court's originalist approach to state sovereign immunity. Professor Caminker points out that in prior decisions “[t]he Court has pointedly not asked whether various aspects of state sovereign immunity, or even the concept in its entirety, make sense in the modern world of expansive federal regulatory power; rather, the Court has insisted that the means through which this power is asserted and enforced conform to its view of the Framers' original understanding as embedded within the constitutional plan.” Caminker, *State Immunity Waivers*, *supra* note 15, at 132. (Indeed, in *Alden* the majority claimed that it sought to discover “only what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system.” *Alden*, 119 S. Ct. at 2268.)

Professor Caminker posits that in the light of relevant precedent, the most persuasive originalist explanation for the ability of the United States to sue states is the “mutuality rationale.” “The reasoning in both *Monaco* and *Blatchford* . . . envisions anthropomorphized states sitting around a bargaining table and agreeing to a mutual pact waiving their immunity for certain kinds of suits but not others. As the Court reconstructs this bargain, states agreed to waive their immunity only where doing so would mutually benefit the parties to the agreement—meaning the states and the United States—and not where it would altruistically benefit outsiders.” Caminker, *State Immunity Waivers*, *supra* note 15, at 110. In this view, the states would have agreed that the United States could sue a state, both because such suits could enable the United States to enforce the obligations owed by one state to another, and because such suits could enforce obligations owed by a state to the federal government (obligations which were “designed in large part for the mutual benefit of the states”). *Id.* at 110-111. Thus, “[a]ccording to the mutuality rationale, a judicial forum should be available whenever the United States seeks to assert one of the legal prerogatives or interests bestowed upon it in the constitutional design.” *Id.* at 113. Consequently, a state defendant should have no sovereign immunity from suits where the United States is the real party in interest on the plaintiff side. *See id.* at 114-15. Professor Caminker also asserts that the originalist view should not focus on federal control of such suits, because “the Founding generation evidenced little if any concern that prosecutors of federal law violations be politically accountable to any centralized federal authority.” *Id.* at 128. Thus, to the extent that the *Alden* Court's functional concerns lead the Court to insist that suits by the United States against a state be litigated by the federal government, Professor Caminker argues that such a requirement “would necessarily reflect a methodological shift from originalism to functionalism, at odds with the Court's claimed basis for the legitimacy of this entire realm of nontextual doctrine.” *Id.* at 132.

It seems possible, however, that a majority of the current Court might reject this elegant argument in favor of an alternative originalist justification for United States suits against states. Professor Caminker notes the Court's statements, in *Texas*, *Monaco* and *Alden*, that the constitutional plan must permit the United States to sue states in order “to provide a forum for the peaceful resolution of intersovereign disputes”—a view he terms the “hostility-avoidance” rationale. *Id.* at 106-07, 111. He rejects this rationale because although it “would seem similarly to support an immunity waiver for suits brought against states by foreign states or Indian nations,” the Court has held that sovereign immunity bars both such kinds of suits. *Id.* at 108. But the *Alden* Court nonetheless stressed that “the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures,” *Alden*, 119 S. Ct. at 2267, suggesting that it continues to give credence to this explanation. And if the Court adheres to the hostility-avoidance rationale as the basis for United States suits against states, it becomes harder to justify suits not prosecuted by the federal government itself. If the government does not, as the *Alden* majority put it, “deem the case of sufficient

At bottom, then, the Court's ruling in *Alden* was more basic than its extensive survey of "history, practice, precedent, and the structure of the Constitution"⁹⁵ might suggest. "The Court said, in effect, that the Federal Government should put its money where its mouth is and enforce its own laws rather than entrust them to private litigants."⁹⁶ This conclusion, in turn, suggests a further inquiry: What distinguishes a suit by the United States from a suit by a private litigant?

II. QUI TAM SUITS AND THE FEDERAL-PRIVATE PLAINTIFF DISTINCTION

The *qui tam* suit—which has fed some speculation regarding the extent to which Congress might empower individuals to enforce federal laws against states⁹⁷—provides a ready illustration of ways in which *Alden*'s reasoning may influence analyses of state sovereign immunity. A split of opinion has developed between the Second, Fourth, Eighth and Ninth Circuits, which hold that *qui tam* suits litigated solely by a private relator are the equivalent of suits by the United States for state sovereign immunity purposes,⁹⁸ and the Fifth Circuit,

importance to take [legal] action against the State," *Alden*, 119 S. Ct. at 2269, it seems unlikely that the dispute could create a serious threat of military conflict between the federal and state governments.

95. *Alden*, 119 S. Ct. at 2260.

96. Kathleen M. Sullivan, Editorial, *Federal Power, Undimmed*, N.Y. TIMES, June 27, 1999, at A17.

97. See, e.g., Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 553, 556-57, 564 (1995) (arguing that, since Congress can provide for the United States to sue a state for damages arising from an injury to an individual and Congress may authorize private parties to prosecute such claims on the United States' behalf as in "the traditional *qui tam* action," Congress "might as well have the power to allow" such suits to be brought by private plaintiffs in their own name); but see, e.g., Caminker, *State Immunity Waivers*, *supra* note 15, at 134 ("Where the 'real party in interest' is private rather than the United States itself, *qui tam* authorization feels like something of a bootstrap; one might suspiciously view it as an effort to circumvent the *Seminole Tribe / Alden* rule that Congress cannot authorize private parties to assert their 'own' interests against states."); Jackson, *supra* note 28, at 506 n.46 (noting that *Blatchford*'s reasoning "suggests that Siegel's argument will be less successful as statutory schemes move closer to giving non-U.S. parties control over the litigation"); Vazquez, *supra* note 42, at 1706 n.110 (observing that *Blatchford* "throws cold water" on Siegel's theory); Scott P. Glauberman, *Citizen Suits Against States: The Exclusive Jurisdiction Dilemma*, 45 J. COPYRIGHT SOC'Y U.S.A. 63, 103 (1997) (arguing that "Siegel's article amounts to little more than an end run around the Eleventh Amendment").

98. See *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 203 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2387

which holds that such suits violate state sovereign immunity.⁹⁹ The Supreme Court granted certiorari in the case decided by the Second Circuit—*United States ex rel. Stevens v. Vermont Agency of Natural Resources*¹⁰⁰—and the sovereign immunity issue is one of the questions presented for the Court's review. Although the Court may ultimately dispose of the *Stevens* case on other grounds,¹⁰¹ *qui tam* suits nonetheless provide an informative testing ground for *Alden's* analysis.

In *qui tam* actions, a private person "maintains a civil proceeding on behalf of both herself and the United States to recover damages and/or enforce penalties available under a statute prohibiting specified conduct" and "shares any monetary recovery with the United States."¹⁰² While the practice of authorizing *qui tam* suits extends back through our nation's history to its roots in English law,¹⁰³ the most prominent current

(1999); *United States ex rel. Berge v. Board of Trustees of Univ. of Alabama*, 104 F.3d 1453, 1458 (4th Cir. 1997); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 963 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995).

99. See *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999). Although the Fifth Circuit declined to state whether the United States could change the sovereign immunity analysis by intervening in the suit, it noted that *Arizona v. California* "may be relevant to that question." *Foulds*, 171 F.3d at 288 n.13.

The D.C. Circuit has avoided the sovereign immunity issue by construing the False Claims Act not to authorize *qui tam* suits against states, see *United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 889-90 (D.C. Cir. 1999), *opinion supplemented*, 173 F.3d 890 (D.C. Cir. 1999), but in so doing it discussed at some length its "profound doubts that the Eleventh Amendment permits" *qui tam* suits against states, see 173 F.3d at 881-86.

100. 162 F.3d 195, 203 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999).

101. The questions presented also include whether a state is a "person" subject to liability under the False Claims Act. See, e.g., *Stevens*, 162 F.3d at 207-08 (holding that states are defendant "persons" under the False Claims Act); *Long*, 173 F.3d at 889-90 (holding to the contrary). Moreover, just 10 days before the Court was scheduled to hear oral argument in *Stevens*, it directed the parties to file supplemental briefs "addressing the following question: 'Does a private person have standing under Article III to litigate claims of fraud upon the government?'" *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 523 (1999). The State of Vermont responded to this invitation by arguing that when a private *qui tam* plaintiff brings a claim under the False Claims Act, either the claim belongs to the United States—in which event Vermont argues the private plaintiff lacks standing to assert the claim—or the claim has been assigned to the private plaintiff—in which case Vermont contends the suit is barred by state sovereign immunity because it does not qualify for treatment as a suit by the United States. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 1999 WL 1134650, at *53 - *54 (U.S. Supreme Court Official Transcript, Nov. 29, 1999).

102. Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341 (1989) [hereinafter Caminker, *Constitutionality*].

103. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) ("Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for

example—and that at issue in each of the cases decided by the Circuits that have so far addressed the immunity issue—is the cause of action provided by the False Claims Act.¹⁰⁴

The False Claims Act provides that “[a]ny person” who makes a false monetary claim to the federal government is liable “to the United States Government” for treble damages and a civil penalty of \$5,000 to \$10,000.¹⁰⁵ Besides authorizing the United States Attorney General to sue violators,¹⁰⁶ the Act provides for “[a]ctions by private persons.” Thus, “[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.”¹⁰⁷ Under the Act, if the federal government decides not to intervene, the private plaintiff can prosecute the suit on its own.¹⁰⁸ In return, the *qui tam* plaintiff stands to receive as much as 30% of the recovery.¹⁰⁹

To the courts that countenance *qui tam* suits against states, the United States—despite its absence from the suit—is the “real party in interest.”¹¹⁰ Thus, it is the United States that suffered injury from the defendant’s false claim and it is the United States that will receive “the lion’s share—at least 70%—

hundreds of years in England, and in this country ever since the foundation of our Government.”) (quoting *Marvin v. Trout*, 199 U.S. 212, 225 (1905)), *quoted in Caminker, Constitutionality*, *supra* note 102, at 341-42; *see also Foulds*, 171 F.3d at 291 n.20 (“Our early legislators adopted the *qui tam* concept from the English system.”).

104. 31 U.S.C. §§ 3729 - 3733 (1994).

105. 31 U.S.C. § 3729(a) (1994).

106. *See id.* § 3730(a).

107. *Id.* § 3730(b)(1). A private plaintiff may not sue under the Act “based upon” allegations or transactions that have been publicly disclosed (as such disclosure is defined in the Act) unless she “is an original source of the information.” *Id.* § 3730(e)(4)(A) (1994); *see, e.g., United States ex rel. McKenzie v. Bellsouth Telecomms., Inc.*, 123 F.3d 935, 938-43 (6th Cir. 1997) (surveying interpretations of the “based upon” and “original source” requirements).

108. *See* 31 U.S.C. § 3730(b)(4)(B) (1994).

109. If the United States chooses not to intervene, the *qui tam* plaintiff receives “not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement,” plus “reasonable” expenses, attorneys’ fees and costs. *Id.* § 3730(d)(2). If the United States intervenes, the *qui tam* plaintiff’s cut of the proceeds decreases to “at least 15 percent but not more than 25 percent;” and in certain circumstances if the United States intervenes and the court finds that the action was based primarily on information not provided by the *qui tam* plaintiff, the latter’s share of the proceeds will be 10 percent or less. *Id.* § 3730(d)(1).

110. *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 963 (9th Cir. 1994); *United States ex rel. Berge v. Board of Trustees of Univ. of Alabama*, 104 F.3d 1453, 1458 (4th Cir. 1997); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992).

of any recovery.”¹¹¹ And in addition to being the nominal plaintiff, the United States retains a certain amount of control over the conduct of the action:

If it wishes to intervene in the action at the outset, the *qui tam* plaintiff cannot prevent it from doing so. Whether or not the government intervenes, it has the right to be kept abreast of discovery in the *qui tam* suit and the right to prevent that discovery from interfering with its investigation or pursuit of a criminal or civil suit arising out of the same facts. If the government intervenes, it takes control of the lawsuit; it may have the participation of the *qui tam* plaintiff limited; and it is not bound by any act of the *qui tam* plaintiff. The government has both the right to prevent a dismissal sought by the *qui tam* plaintiff and the right to cause the action to be dismissed for any rational governmental reason, notwithstanding the *qui tam* plaintiff's desire that it continue.¹¹²

But while *Alden*'s analysis requires courts to assess whether and to what extent the federal government controls an action against a state, the Court is likely to be more interested in types of control that hold the promise of benefits to the state defendant, or at least of checks on the *qui tam* plaintiff's zeal. Specifically, by linking the requirement of federal “control” of suits against states to “the exercise of political responsibility for [the] suit,”¹¹³ *Alden* suggests that the key feature of the relevant control is that it enables the United States to moderate its litigation stance in response to political pressures. This goal, of course, appears to conflict with the aims of the *qui tam* provisions of the False Claims Act, to the extent those provisions arise from a concern that “[g]overnment agencies may be sufficiently dependent upon (or co-opted by) specific players . . . that the desire to prosecute wrongdoers diligently is compromised.”¹¹⁴ Moreover, it is not intuitively obvious that the Executive's duty to “take [c]are that the [l]aws be faithfully executed” should require the Executive to give weight to a potential defendant's interests when formulating the United States' litigation positions. In the case of state defendants, however, the Court appears to view such consideration of state

111. United States *ex rel.* Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195, 202 (2d Cir. 1998).

112. *Id.* at 202-03.

113. *Alden*, 119 S. Ct. at 2267.

114. Caminker, *Constitutionality*, *supra* note 102, at 351 (discussing possibility of co-option by “players in the military-industrial complex”).

interests not as a danger but rather as a salutary exercise in political accountability. The United States' influence over a relator's prosecution of a *qui tam* suit, then, must be assessed by reference to the federal government's ability to curtail the claims against the state.

Measured by this yardstick, many elements of the control detailed above are either illusory or else irrelevant. For example, the United States' right to intervene in the action is not unlimited,¹¹⁵ and in any event that right is, by definition, academic in cases where the United States never chooses to intervene. Likewise, the fact that the United States, if it intervenes, "shall not be bound by an act of the person bringing the action"¹¹⁶ seems more suited to the elimination of defenses such as waiver or estoppel than to protecting the rights of the state.¹¹⁷ Many of the prerogatives reserved to the United States when it chooses not to intervene are also inapposite to the state sovereign immunity inquiry. For instance, the United States' right to 'keep abreast' of discovery in the *qui tam* action by receiving copies of all pleadings and deposition transcripts¹¹⁸ is more likely to assist the United States in pressing related claims in other fora—possibly against the state—than it is to further the interests of the state defendant. Likewise, the requirement that the government consent to the dismissal of a *qui tam* action¹¹⁹ offers little apparent benefit to a state defendant.¹²⁰

115. If the government changes its mind after having chosen at the outset of the case not to intervene, it must show "good cause" in order to intervene at a later point in the case. See 31 U.S.C. § 3730(c)(3) (1994).

116. *Id.* § 3730(c)(1).

117. *Cf.* Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917) ("As a general rule laches or neglect of duty on the part of officers of the [Federal] Government is no defense to a suit by it to enforce a public right or protect a public interest.").

118. See 31 U.S.C. § 3730(c)(3) (1994).

119. See *id.* § 3730(b)(1) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."); compare *Searcy v. Philips Elecs. North Am. Corp.*, 117 F.3d 154, 158-59 (5th Cir. 1997) (Attorney General's consent to voluntary dismissal is required even if United States has decided not to intervene); *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1397 (9th Cir. 1992) (holding the same), with *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 724 (9th Cir. 1994) (where federal government declines to intervene, it "may not obstruct the settlement and force a *qui tam* plaintiff to continue litigation," but it may obtain a hearing to "question the settlement for good cause," as where "a *qui tam* plaintiff and defendant . . . artificially structur[e] a settlement to deny the government its proper share of the settlement proceeds"); *Minotti v. Lensink*, 895 F.2d 100, 103 (2d Cir. 1990) (*per curiam*) (holding that § 3730(b)(1) "applies only in cases where a plaintiff seeks voluntary dismissal of a claim or action . . . and not where the court orders dismissal").

120. Section 3730(b)(1)'s requirement of written consent by both the court and the

When one looks only to the ways in which the federal government's control over a *qui tam* action can safeguard a state's interests, the rights granted to the United States when it chooses not to intervene in the action are somewhat more limited; but they are nonetheless significant. The United States can seek dismissal of the action over the objection of the *qui tam* relator, though only after the relator receives notice and a hearing on the government's motion to dismiss.¹²¹ This provision for judicial review may render the United States'

Attorney General theoretically might help to prevent a vexatious *qui tam* plaintiff from dismissing and then refile litigation for improper purposes. Rule 41 of the Federal Rules of Civil Procedure provides similar protection, but may not apply to a dismissal of a *qui tam* action. See FED. R. CIV. P. 41(a) (after defendant's service of either an answer or a motion for summary judgment, plaintiff may dismiss its claims only by leave of court or by stipulation signed by all parties that have appeared); FED. R. CIV. P. 41(a)(1) (provisions for dismissal by stipulation are "[s]ubject to the provisions of . . . any statute of the United States"); cf. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (in False Claims Act *qui tam* suit, Rule 41—which "protects defendants from vexatious plaintiffs"—does not apply to "the dismissal decision of the real party in interest, the government, under a specific statute establishing unique relationships among the parties"), *cert. denied*, 119 S. Ct. 794 (1999).

121. See 31 U.S.C. § 3730(c)(2)(A) (1994). There is some question as to whether § 3730(c)(2) applies to actions in which the United States chooses not to intervene, since that provision specifies limitations on the rights of the *qui tam* relator in the event that the United States *does* intervene. See *id.* § 3730(c)(1) ("If the Government proceeds with the action" the *qui tam* relator "shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2)."). By contrast, if the United States elects not to intervene initially, the Act provides that the court may "permit the Government to intervene at a later date upon a showing of good cause" but such permission must not "limit[] the status and rights of the person initiating the action." *Id.* § 3730(c)(3).

Arguably, since "it would severely 'limit the status and rights' of the *qui tam* relator if the DOJ later intervened and dismissed or settled the suit . . . unless the DOJ initially intervenes during the 60-day period, it loses all power to dismiss or settle the suit" James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 708 (1993). One court, however, has reasoned that to "assume that the *qui tam* provisions of the False Claims Act were intended to curtail the prosecutorial discretion of the Attorney General" would "raise serious constitutional questions." *Juliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D.D.C. 1990), *aff'd mem.*, 959 F.2d 1101 (D.C. Cir. 1992) (holding that the United States could move for dismissal of some of a *qui tam* relator's claims at the outset of the litigation without first seeking to intervene in the action); see also *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 753 n.10 (9th Cir. 1993) (approving the *Juliano* Court's interpretation as "an illustration of the meaningful control which the Executive Branch can exercise over *qui tam* actions"). The same analysis should apply to allow the United States to seek dismissal at a later time, rather than at the start of the litigation. Thus, the United States, as intervenor, has been allowed to seek dismissal of a *qui tam* suit under § 3730(c)(2)(A), even though the intervention did not occur at the outset of the suit. See *Sequoia Orange Co.*, 151 F.3d at 1145 ("Nothing in § 3730(c)(2)(A) purports to limit the government's dismissal authority based upon the manner of intervention.").

ability to dismiss *qui tam* suits somewhat more formal, and perhaps less suited to the accommodation of political concerns, than the Court envisioned when it wrote of suits “under the control of responsible federal officers.”¹²² On the other hand, it appears unlikely that courts will require more than a rational basis for the government’s motion to dismiss.¹²³ Likewise, the requirement that the court hold a fairness hearing on any settlement entered into by the government over the objections of the relator should not prove too daunting an obstacle, especially since the hearing may be held *in camera* if necessary.¹²⁴ On balance, then, the structure of *qui tam* suits under the False Claims Act may provide the United States with sufficient control that the conduct of the suits will not be guided solely by the private interests of the relator, untempered by political accountability.

However, the ability to implement policies based on political accountability may mean little if the accountability itself never materializes. While the United States likely can exercise significant influence in favor of the state defendant in a *qui tam* suit, it is less apparent that the United States will have a motive to do so. Although the United States is a nominal plaintiff in such a suit, it can potentially—if it chooses not to intervene—disclaim responsibility for the relator’s actions in bringing and maintaining the suit.¹²⁵ At least in the minds of members of the public at large, the government is less likely to seem responsible for failing to put a stop to a *qui tam* suit by a private individual than for bringing suit itself. Likewise, some have argued that the absence of the federal government from *qui tam* suits “prevents congresspersons from fulfilling their

122. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991).

123. *See United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 201 (2d Cir. 1998) (citing *Sequoia Orange Co.*, 151 F.3d at 1145, for proposition that “in light of Separation of Powers concerns, district court need find only that the government’s decision to dismiss a *qui tam* suit, even a meritorious one, is supported by a ‘valid governmental purpose’ that is not arbitrary or irrational and has some ‘rational relation’ to the dismissal”); *but see Stevens*, 162 F.3d at 223 (Weinstein, J., dissenting) (referring to a case “in which *qui tam* provisions permitted a relator to force a suit that the Department of Justice would have chosen not to pursue if the exercise of its prosecutorial discretion had not been undermined”).

124. *See* 31 U.S.C. § 3730(c)(2)(B) (1994) (government may settle over relator’s objections “if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances”).

125. *See United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 885 (D.C. Cir. 1999) (arguing that *qui tam* arrangement would permit the United States to “remov[e] itself from direct accountability” for the suit).

representative function of interceding on behalf of their home states in disputes with the federal government and interferes in the cooperative relationships between state agencies and their federal counterparts.”¹²⁶ In this view, by allowing suits to proceed in the absence of the federal government, the *qui tam* system “effectively short circuits the moderating processes afforded congresspersons and state and federal administrators.”¹²⁷

Finally, *qui tam* suits are by nature antithetical to *Alden*’s goal of forcing the government to set priorities among its claims against states. As the Court is well aware, the United States lacks the resources to litigate every state violation of a federal right.¹²⁸ Thus, the United States’ decision to litigate a particular claim reflects, in the view of the *Alden* Court, a determination that the case is important enough, compared to other potential litigation, to warrant action by the federal government.¹²⁹ The *qui tam* suit, by contrast, serves the opposite goal,¹³⁰ for it

126. *Stevens*, 162 F.3d at 219 (Weinstein, J., dissenting).

127. *Id.* at 225; *see also id.* (arguing that the “process by which federal representatives seek to influence the administrative discretion of the executive branch on behalf of their constituents, sometimes described as ‘casework,’ has become an integral part of American federalism”). The force of this argument is open to question; Professor Caminker challenges Judge Weinstein’s analysis as “highly speculative.” Caminker, *State Immunity Waivers*, *supra* note 15, at 123-24 (noting that “[s]tates (and their congressional representatives) do sometimes influence federal regulatory policy,” but arguing that “escaping from erstwhile legal liability [is] a more dubious prospect”).

128. *See, e.g., Alden v. Maine*, 119 S. Ct. 2240, 2292-93 (1999) (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ., dissenting); Carlos Manuel Vazquez, *Night and Day: Coeur d’Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 14 (1998) (“In a world of limited governmental resources,” to require that only the United States can sue states for violations of federal law “means that some significant portion of such violations will go uncorrected.”); *cf., e.g., Employees of Dep’t of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 297 n.12 (1973) (Marshall, J., joined by Stewart, J., concurring in result) (noting that “[i]t is obviously unrealistic to expect Government enforcement alone to be sufficient” to implement the provisions of the Fair Labor Standards Act).

129. Even if the Court is correct that such prioritization by the United States will generally lead the government to sue on the most important claims, presumably in some instances a rule against suits by private *qui tam* relators will lead to underenforcement. *See* Caminker, *State Immunity Waivers*, *supra* note 15, at 120 n. 128 (noting that “[t]here might be some suits that only a private relator but not an executive official would pursue (for example, where the suit seems meritorious but the gains too small to justify the deployment of scarce public resources)”; *id.* at 122 (“Congress’s rationale for revitalizing the False Claims Act’s *qui tam* provisions was that the executive branch by itself was underenforcing federal law because it lacked the resources to detect violations or prosecute them once detected.”).

130. *See United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992) (by providing for *qui tam* suits, Congress “gave the

enables private parties to prosecute claims that the government concludes it lacks the resources or the desire to press itself.¹³¹ Indeed, if the *qui tam* plaintiff is like “an attorney working for a contingent fee,”¹³² she seems to be a lawyer without a client.¹³³ Unlike a client, the United States is not a party to the *qui tam* suit, and thus is subject neither to the discovery rules governing parties,¹³⁴ nor to the disciplinary authority of the court, nor to liability for costs or attorneys’ fees.¹³⁵ In sum, the *qui tam* provisions give the United States many of the benefits of bringing a claim while permitting it to evade the burdens and responsibilities of litigation.

Thus, *qui tam* suits against states in which the United States chooses not to intervene fall close to the line sketched by

Executive Branch the option to allocate its resources elsewhere”).

131. A requirement that the United States itself press the claim would, of course, decrease dramatically the absolute number of damages suits brought against states. Presumably, this effect is not in itself a functional justification for the *Alden* Court’s rule. See Caminker, *State Immunity Waivers*, *supra* note 15, at 120 (noting that “an executive form requirement cannot persuasively be justified merely because it would likely lead to fewer suits being filed against states”). To the members of the *Alden* majority, however, such an effect might accord with an originalist view of the states’ consent, in the constitutional plan, to suit by the United States. If the Court adheres to the view that this consent arose from the desire to avoid federal resort to “extralegal measures,” *Alden*, 119 S. Ct. at 2267, then the Court might also posit that the states consented to such suits only to the extent necessary to avoid armed conflicts with the United States—a limitation that might map fairly closely onto the small subset of United States claims that the federal government elects to litigate itself.

132. *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 202 (2d Cir. 1998).

133. As the Fifth Circuit has noted, while “an attorney owes important fiduciary duties to his client,” no such duty “prevents the *qui tam* plaintiff from furthering his own interests to the detriment of the United States’ interests.” *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 290 n.18. (5th Cir. 1999).

134. See *United States ex rel. Farrell v. SKF, USA, Inc.*, 32 F. Supp.2d 617, 617-19 (W.D.N.Y. 1999) (in *qui tam* suit in which United States has chosen not to intervene, United States is not “a litigating party subject to the discovery rules”). As a practical matter, the United States’ absence may not always disadvantage the defendant in terms of discovery. See John T. Boese, *The Science and Art of Defending a Civil False Claims Act Case Brought by a Qui Tam Relator*, A.B.A. WHITE COLLAR CRIME 1997, N97WCCB ABA-LGLED I-1, at *I-15 (1997) (arguing that if the United States chooses not to intervene, defense counsel can seek information from the United States through informal discovery methods that “are an enormous source of cheaper, easier and many times far more useful discovery than formal depositions”).

135. See *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 869 (8th Cir. 1998) (Panner, J., dissenting) (“Unless it intervenes, the United States is not liable for any costs or attorney fees awarded to the defendants.”); cf. 31 U.S.C. § 3730(g) (1994) (“In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.”); 28 U.S.C. § 2412(d) (1994) (providing that in a civil action brought by or against the United States a “prevailing party” may, if it meets certain requirements, recover “fees and other expenses” from the United States).

the *Alden* Court around state sovereign immunity. To be sure, such suits arise from injury to, and seek recovery for, the United States, and the government retains some degree of control over their conduct. But such suits conspicuously violate the *Alden* Court's rule "that the National Government must itself deem the case of sufficient importance to take action against the State."¹³⁶ By contrast, *Arizona* intervention—as will become clear from the description that follows—suffers from no such defect.

III. ARIZONA AND SUBSEQUENT CASES

In approving the tribal litigants' intervention in *Arizona v. California*,¹³⁷ the Court did not discuss whether the Constitution requires that the United States retain any particular degree of influence or control over the prosecution of the claims against the states. However, *Arizona*'s facts, procedural history and holding indicate that tribal intervention does not offend state immunity, even where the tribal litigant makes different arguments, and seeks more extensive relief, than does the United States. In this section, I summarize relevant aspects of the *Arizona* case, and then examine whether *Arizona*'s holding is still good law.

A. *Arizona*

The *Arizona* litigation began in 1952 when Arizona brought an original proceeding against California in the Supreme Court to confirm Arizona's title to, and limit California's use of, the waters of the lower Colorado River.¹³⁸ Nevada intervened to seek a determination of its water rights, and Utah and New Mexico were joined as defendants.¹³⁹ The United States then intervened to assert water rights on behalf of various federal "establishments," including the reservations of five Indian tribes (the "Tribes").¹⁴⁰

136. *Alden*, 119 S. Ct. at 2269; see also *Foulds*, 171 F.3d at 293-94 ("Unless the United States commits its own resources—both personnel and money that are under its authority and control—private citizens should not be able to sidestep the Eleventh Amendment and hail the sovereign states into federal court.").

137. 460 U.S. 605 (1983).

138. See *id.* at 608.

139. See *id.*

140. *Id.* at 608-09.

By means of a decree issued in 1964,¹⁴¹ amended in 1966¹⁴² and supplemented in 1979,¹⁴³ the Supreme Court created a system to allocate water rights among the litigants. The decrees apportioned certain amounts of water to each of Arizona, California and Nevada and required the United States, which controlled the flow of water in the relevant portion of the Colorado River, to follow a particular order of priority in distributing it.¹⁴⁴ In the event of a water shortage, the United States was required to provide the five Tribes with their full annual allotment of water before providing water to the three states.¹⁴⁵

Prior to the entry of the 1979 decree, the Tribes moved to intervene to assert new claims to additional water rights appurtenant to lands they claimed should be counted as part of their respective reservations.¹⁴⁶ Not only had the United States not asserted those claims, but it even initially opposed the Tribes' intervention—though it eventually joined the Tribes in claiming additional water rights.¹⁴⁷ Meanwhile, the Court in 1979 disposed of all the other issues in the case and referred the intervention motions¹⁴⁸ to a Special Master.¹⁴⁹

By the time that the Special Master ruled on the Tribes'

141. See *Arizona v. California*, 376 U.S. 340 (1964).

142. See *Arizona v. California*, 383 U.S. 268 (1966).

143. See *Arizona v. California*, 439 U.S. 419 (1979).

144. See *Arizona*, 376 U.S. at 340-46.

145. See *Arizona v. California*, 460 U.S. 605, 611 (1983). The 1979 decree enumerated a limited number of specific properties in Arizona and California, the water rights of which could be satisfied before those of the Tribes. See *Arizona*, 439 U.S. at 421.

146. See *Arizona*, 460 U.S. at 612.

147. See *id.*

148. Three of the Tribes had also sought to intervene to oppose entry of the Court's 1979 decree setting the order of priority of the water rights; the Court refused to grant them leave to intervene for this purpose. See *id.* Since the parties had been litigating the order of priority since the late 1960s, see, e.g., *Arizona*, 439 U.S. at 424 n.3 (discussing Arizona's 1967 submission), and the intervention motion was not made until 1977 at the earliest, see 460 U.S. at 612, it seems likely that the Court's refusal to grant intervention as to the subject matter of the 1979 decree stemmed from the belated nature of the application. See *Arizona*, 460 U.S. at 615 (granting motions to intervene with respect to new issues because "[t]he Tribes' motions to intervene are sufficiently timely with respect to *this* phase of the litigation" (emphasis added)); cf. FED. R. CIV. P. 24 (requiring that applications to intervene in district court proceedings be "timely"); *Arizona*, 460 U.S. at 614 (noting that the Federal Rules of Civil Procedure provide a guide to procedure in original actions before the Court).

149. Special Master Elbert P. Tuttle had been appointed to the federal bench in 1954. At the time of his involvement in the *Arizona* case he was a Senior Circuit Judge on the Fifth Circuit—and then the Eleventh Circuit—Court of Appeals.

motions to intervene, "[t]he only substantive issue pending in [the] litigation [wa]s the determination of land questions on which depend the present perfected rights of which the Tribes are the beneficial owners."¹⁵⁰ The states vigorously opposed intervention, contending that the Tribes' interests were adequately represented by the United States¹⁵¹ and that tribal intervention without the states' consent would violate their Eleventh Amendment immunity.¹⁵²

The Special Master rejected some of the Tribes' arguments as to the inadequacy of the United States' representation,¹⁵³ reasoning that the United States could not be held to the same conflicts standards as an ordinary fiduciary.¹⁵⁴ But the Special Master nonetheless found significant differences between the Tribes' interests and those of the United States, most importantly that "in their pleadings, the United States and the Tribes claim significantly different amounts of irrigable acreage," with the result that "[t]o the extent of these differences the Indian claims are not actually represented" by the United States.¹⁵⁵ More generally, the Special Master reasoned that "[i]n its representation of the Tribes, though it must reasonably fulfill the nation's trust obligations or face the prospect of liability for their breach, the United States also acts on considerations of Indian policy or other national concerns which may yield a different litigation position than the represented Tribes themselves would reach."¹⁵⁶ Finally, although the Special

150. Mem. and Report on Prelim. Issues [hereinafter Special Master Report] at 6-7, *Arizona* (Aug. 28, 1979).

151. See *id.* at 8. Arizona opposed any sort of tribal intervention whatsoever, see *id.*; California, Nevada and Utah were willing to consent to intervention only on certain conditions, including that the tribes be represented only by their own counsel and no longer by the United States, and that the tribes be allowed to assert only certain kinds of claims (those for water rights appurtenant to acreage outside the reservation boundaries as conceded by the United States for purposes of the 1964 decree) and not other kinds of claims (those for acreage within the boundaries conceded for the 1964 decree but not claimed by the United States prior to the 1964 decree), see *id.* at 2, 18.

152. See *id.* at 18.

153. The Tribes contended that the United States had conflicted loyalties springing from its interests on behalf of other federal establishments and its involvement in the management of the river system; moreover, they pointed out that the United States had already failed the Tribes by omitting to present initially the claims which the Tribes now sought to assert. The Special Master rejected these arguments on the basis that, whatever may have gone before, they did not raise concerns as to the United States' current ability to discharge its duties to the Tribes. See *id.* at 9-10.

154. See generally *id.* at 10 n.18.

155. *Id.* at 11.

156. Special Master Report, *supra* note 150, at 11-12 (footnotes omitted).

Master assumed that "the Eleventh Amendment excludes from federal jurisdiction suits against a state by an Indian tribe,"¹⁵⁷ he held that the Amendment was no bar to intervention by the Tribes.¹⁵⁸

Not surprisingly, the exceptions filed by the states in the Supreme Court included an objection to the Tribes' intervention. The Court, however, upheld the grant of intervention, stating that because "[t]he Tribes do not seek to bring new claims or issues against the states, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States," the Court's "judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised."¹⁵⁹

The Court's terse holding is illuminated perhaps less by its words than by what went unsaid, for the Court eschewed each of the Special Master's three rationales. *First*, the Court, unlike the Special Master,¹⁶⁰ did not invoke the concept that the Tribes' claims were "ancillary" to the main proceeding before it. Indeed, such a view would have run contrary to the Court's own assessment of the case, which made clear that the proceeding in which the Tribes sought to intervene was new, self-contained, and separate from the previously-resolved disputes:

The 1979 Decree . . . resolved outstanding issues in the litigation. But before that Decree was entered new questions arose: The five Indian Tribes, ultimately joined by the United States, made claims for additional water rights to Reservation lands.¹⁶¹

The Court may also have found the ancillary jurisdiction rationale doctrinally unpersuasive. Only a year later, in *Pennhurst State School & Hospital v. Halderman*,¹⁶² it would hold that pendent jurisdiction did not override the Eleventh

157. *Id.* at 17; *see also id.* n.30.

158. *See id.* at 16-30.

159. *Arizona v. California*, 460 U.S. 605, 614 (1983). The Court, like the Special Master, assumed for the sake of argument "that a State may interpose its immunity to bar a suit brought against it by an Indian tribe." *Id.*

160. The Special Master maintained that because the Tribes' "claims as intervenors are ancillary to a case or controversy . . . within the federal judicial power and already before the Court," intervention "is therefore within the scope of the States' constitutional surrender of immunity." Special Master Report, *supra* note 150, at 18; *see also id.* at 20-24.

161. *Arizona*, 460 U.S. at 611.

162. 465 U.S. 89 (1984).

Amendment with respect to state-law claims.¹⁶³

Second, the Court rightly ignored the Special Master's argument that the relief sought by the Tribes would not "run against the States,"¹⁶⁴ for such plainly was not the case. Since the Tribes' allocations were the first to be fulfilled in the event of a water shortage, the increased water rights won by the Tribes operated directly to decrease the water rights of the states—rights that those states had asserted throughout decades of litigation. Admittedly, the relief sought by the Tribes would not necessarily alter the allocation of water *among* the states; but it would "require a gallon-for-gallon reduction in the amount of water available" to states and other non-Indian users as a group.¹⁶⁵ *Third*, the Court disregarded the Special Master's argument that Congress had abrogated the states' immunity in enacting 28 U.S.C. § 1362¹⁶⁶—a rationale that the Court would later reject in *Blatchford*.¹⁶⁷

The Court's holding, moreover, is informed not only by the arguments the Court rejected but also by the facts of which it must have been aware. The Special Master's Preliminary Report made clear that the Tribes sought greater relief than did the United States¹⁶⁸—indeed, that conclusion was among the primary reasons the Special Master permitted the Tribes to intervene.¹⁶⁹ The Special Master, however, viewed the Tribes not as "rais[ing] new claims," but rather as seeking merely "to

163. *See id.* at 121.

164. The Special Master wrote that "[t]he Tribes do not now seek to present new claims against the States which will alter the allocation of water among the States as determined by the Supreme Court . . . nor do they seek relief which will run against the States." Special Master Report, *supra* note 150, at 19.

165. *Arizona v. California*, 460 U.S. 605, 621 (1983).

166. *See* Special Master Report, *supra* note 150, at 25-30. Section 1362, which provides that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any [federally recognized] Indian tribe or band . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1362 (1994), was intended "to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought," *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 472 (1976).

167. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 788 (1991).

168. *See* Special Master Report, *supra* note 150, at 11. The extent of the Tribes' water rights depended on the irrigable acreage within their reservations. The Special Master specifically noted that "[w]ith one exception, the total irrigable acreage which the United States claims for each reservation . . . differs significantly from that claimed by the Tribes on their own behalfs," in all but one instance because the Tribes claimed greater acreage than did the United States. *Id.* at 3 & n.6.

169. *See id.* at 11.

quantify existing rights already presented by the United States and determined by the Court.”¹⁷⁰ Hence when the Court adopted the view that the Tribes did not seek to bring “new claims or issues” against the states, it was not referring to an absence of quantitative differences in the relief requested.

Thus, *Arizona* demonstrates that Indian tribes can intervene in actions litigated by the United States—without offending state sovereign immunity—even if the tribes seek relief that is quantitatively more extensive than that requested by the United States.

B. Later Cases

Despite its recent flurry of decisions favoring state sovereign immunity, the Court has not retreated from its holding in *Arizona*. In particular, the Court’s decisions in *Pennhurst State School & Hospital v. Halderman*¹⁷¹ and in *Idaho v. Coeur d’Alene Tribe*¹⁷² do not affect the *Arizona* doctrine; and though the Court’s recent decision in *Minnesota v. Mille Lacs Band*¹⁷³ provided an opportunity to revisit *Arizona*, the Court did not do so.

Though at first glance the Court’s discussion in *Pennhurst* of pendent jurisdiction and the Eleventh Amendment might seem relevant to *Arizona* intervention, closer inspection shows *Pennhurst* to be inapposite. In *Pennhurst*, the Court held that pendent jurisdiction cannot override a state’s Eleventh Amendment immunity with respect to an individual’s state-law claim, and that therefore the Eleventh Amendment barred the award of injunctive relief to private plaintiffs, under a state law, against state officials.¹⁷⁴ The Court explained that “[a] federal court must examine each claim in a case to see if the court’s jurisdiction over that claim is barred by the Eleventh Amendment”¹⁷⁵ and noted that “[a]lthough the Eleventh Amendment does not bar the United States from suing a State in federal court, the United States’ presence in the case for any purpose does not eliminate the State’s immunity for all

170. *Id.* at 13.

171. 465 U.S. 89 (1984).

172. 521 U.S. 261 (1997).

173. 119 S. Ct. 1187 (1999).

174. *See Pennhurst*, 465 U.S. at 124-25.

175. *Id.* at 121.

purposes.”¹⁷⁶ Thus, although the United States had intervened as a plaintiff,¹⁷⁷ the Court held that because the United States lacked standing “to assert the state-law claims of third-parties” its presence did not affect the application of the Eleventh Amendment to such claims.¹⁷⁸

Pennhurst’s holding has no bearing on *Arizona*, for the Court in *Arizona* did not rely on the concept that the proceeding in question was ancillary to the litigation that had gone before.¹⁷⁹ Moreover, the United States clearly has standing to assert federal claims on behalf of Indian tribes pursuant to its trust obligations,¹⁸⁰ and thus the *Pennhurst* scenario—where the United States had no standing to assert individuals’ state-law claims—has no application.¹⁸¹

Similarly, nothing in *Coeur d’Alene Tribe* undermines *Arizona*. In *Coeur d’Alene Tribe*, the Court held that the Eleventh Amendment barred the Tribe’s claims for declaratory and injunctive relief against state officials concerning the Tribe’s asserted beneficial interest in certain lands and waters.¹⁸² After the district court dismissed the Tribe’s claims, the United States filed a separate suit against the state on the Tribe’s behalf, seeking to quiet title to about a third of the land at issue in the Tribe’s action.¹⁸³ None of the parties contended, and the Court did not suggest, that the United States’ separate and subsequent suit had any relevance to the sovereign immunity question before the Court; indeed, the Court noted that the government’s suit was “not implicated” in the case before it.¹⁸⁴ Though a closer question might have been presented had the

176. *Id.* at 103 n.12 (citation omitted).

177. *See id.* at 96 n.5.

178. *Id.* at 103 n.12.

179. *See* Part III.A. above.

180. *See* Part IV.A.2. below.

181. Thus, the holding of *Pennhurst* belies the D.C. Circuit’s suggestion in *United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 885 (D.C. Cir. 1999), that under *Pennhurst* states retain their sovereign immunity to a private plaintiff’s federal claim even if the United States intervenes to assert the same claim. *See* *Cayuga Indian Nation v. Cuomo*, Nos. 80-CV-930 & 80-CV-960, 1999 WL 509442, at *14 (N.D.N.Y. July 1, 1999) (holding that *Arizona*, and not *Pennhurst*, applies where the United States has intervened and “is seeking to enforce the [tribal plaintiffs’] federal rights”).

182. *See* *Coeur d’Alene Tribe*, 521 U.S. at 264-65, 287-88.

183. *See id.* at 266.

184. *Id.*; *see also* Petitioner’s Brief at 6-7, *Coeur d’Alene Tribe* (1996 WL 290997); Respondent’s Brief at 4, *Coeur d’Alene Tribe* (1996 WL 380391); Reply Brief at 10-11, *Coeur d’Alene Tribe* (1996 WL 439249).

Tribe sought to consolidate its case with the government's action, it had no such opportunity in *Coeur d'Alene Tribe* since the government did not sue until after the Tribe's suit was dismissed. Thus, *Coeur d'Alene Tribe*, at most, indicates an unwillingness to extend the *Arizona* rationale beyond claims brought in the *same* suit by a tribe and the federal government.

Likewise, the Court could have revisited the *Arizona* issue in *Mille Lacs Band*, but it chose not to. In *Mille Lacs Band*, the Eighth Circuit held under *Arizona* that the United States' presence as a plaintiff-intervenor removed any state sovereign immunity to the Mille Lacs Band's claims.¹⁸⁵ After the Supreme Court granted certiorari, the state defendants briefed the certified issues but did not question the lower courts' holdings on state sovereign immunity.¹⁸⁶ Similarly, no mention was made of state sovereign immunity at oral argument¹⁸⁷ and the issue is absent from both the opinion for the Court¹⁸⁸ and the dissent.¹⁸⁹ Admittedly, the Court's affirmance of the judgment in favor of the plaintiffs does not indicate that it considered the Eleventh Amendment issue, for under *Wisconsin Department of Corrections v. Schacht*¹⁹⁰ if a state neglects to press its Eleventh Amendment defense a court need not raise the defect on its own.¹⁹¹ Nonetheless, since a court can raise an Eleventh Amendment issue *sua sponte* if it chooses,¹⁹² the Court's silence

185. See *Mille Lacs Band v. Minnesota*, 124 F.3d 904, 913-14 (8th Cir. 1997), *aff'd on other grounds*, 119 S. Ct. 1187 (1999).

186. See Brief for the Petitioners, *Mille Lacs Band* (1998 WL 464932); Reply Brief for the Petitioners, *Mille Lacs Band* (1998 WL 761906). The County defendants and an amicus each submitted a brief obliquely criticizing Eleventh Amendment rulings by the lower courts. See Brief of Respondent Counties in Support of Petitioner State of Minnesota at 18, *Mille Lacs Band* (1998 WL 464930) ("The court's order enjoining the State from enforcement of its conservation laws while requiring the State to restrict other citizens is beyond a court's jurisdiction (and relief barred by the 10th and 11th Amendments)."); Brief for the Citizens Equal Rights Alliance (CERA) as Amicus Curiae in Support of Petitioners at 8, *Mille Lacs Band* (1998 WL 464928) ("Based on an original jurisdiction decision, the Judge relied on an 1837 Treaty to defeat Eleventh Amendment defenses to an action under 42 U.S.C. § 1983."). However, neither brief highlighted the issue.

187. See Transcript, *Mille Lacs Band* (1998 WL 849395).

188. See 119 S. Ct. 1187.

189. See *id.* at 1206 (Rehnquist, C.J., joined by Scalia, Kennedy and Thomas, JJ., dissenting).

190. 118 S. Ct. 2047 (1998).

191. See *id.* at 2052.

192. See, e.g., *Parella v. Retirement Bd.*, 173 F.3d 46, 54-55 (1st Cir. 1999); *V-1 Oil Co. v. Utah State Dep't of Public Safety*, 131 F.3d 1415, 1420 (10th Cir. 1997); *Ysleta Del Sur Pueblo v. Texas*, 36 F.3d 1325, 1335 (5th Cir. 1994). Although the Seventh Circuit has stated that *Schacht* "ruled that a federal court must not raise a potential Eleventh

suggests that it continues to adhere to the holding in *Arizona*.

In sum, the Court's recent decisions have not questioned the propriety of *Arizona* intervention; but neither have they commented upon it. Thus, further inquiry into the Court's likely view of the doctrine must draw upon the Court's more general approaches to state sovereign immunity. In this regard, the *Alden* majority's focus on the nature of the plaintiff seems particularly pertinent.

IV. ARIZONA IN THE LIGHT OF *ALDEN*

As noted above, the Court's recent formulation of the concerns underlying state sovereign immunity may prompt a reevaluation of certain types of suits, such as *qui tam* actions in which the United States does not intervene. But far from bringing *Arizona* intervention into question, *Alden*'s formal approach and its functional analysis provide support for tribal participation in United States suits against states.

A. *Arizona and the Formal Federalism Inquiry*

The terseness of the *Arizona* opinion perhaps reflected the fact that the question of intervention by Indian tribes in federal government suits against states is nowhere directly addressed in the sources to which the Court customarily turns for guidance on issues of federalism.¹⁹³ Thus, the discussion that follows does not address all the sources on which the *Alden* Court drew for its formal analysis, for some of those—for instance English legal precedents, and statements by the Framers and their contemporaries—have no direct relevance to *Arizona* intervention. Of the remaining topics treated in *Alden*'s formal analysis, the Court's emphasis on state dignity, and its focus on historical practices, seem most relevant, and inquiries along

Amendment issue *sua sponte*," *Schacht v. Wisconsin Dep't of Corrections*, 175 F.3d 497, 501 (7th Cir. 1999), nothing in *Schacht* supports such a reading, *see, e.g., Schacht*, 118 S. Ct. at 2052 ("Unless the State raises the matter, a court *can* ignore it" (emphasis added)).

193. Although the colonial era provided some precedent for the relationship among the new federal government, the states and the Indian tribes, *see, e.g., Worcester v. Georgia*, 31 U.S. 515, 547-48 (1832) (discussing the Regal Proclamation of Oct. 7, 1763, which provided that colonial governors could not grant patents to Indian lands without the Crown's approval); *see generally* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1064-98 (1995) (discussing colonial interactions with Indian tribes), the traditional sources of federalism precepts are silent on the particular question of *Arizona* intervention.

those lines indicate that *Arizona* is doctrinally sound.

1. State "dignity" and tribal suits

The *Alden* Court's recurrent references to state "dignity"¹⁹⁴ suggest that such a concept would figure in the Court's analysis of tribal participation in suits by the United States. As an initial matter, however, the question arises whether a concern for state "dignity" remains a valid consideration in state sovereign immunity analysis. An abstract conception of state dignity seems a hollow basis for denying redress for state violations of federal law; as the *Alden* dissenters argued, "[i]t would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own."¹⁹⁵ The *Alden* majority, though, appears to regard state "dignity" as a way of conceptualizing the reservation of certain rights and powers to the states. Dignity, in this perspective, is the touchstone of the states' residuary sovereignty: "[t]hey are not

194. See *Alden v. Maine*, 119 S. Ct. 2240, 2247 (1999) (states retain "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status"); *id.* (states "retain the dignity, though not the full authority, of sovereignty"); *id.* (Framers "considered immunity from private suits central to sovereign dignity"); *id.* at 2258 (a sovereign's immunity from suit in court of another sovereign must arise either from an agreement between the two sovereigns, "or in the voluntary decision of the second to respect the dignity of the first" (quoting *Nevada v. Hall*, 440 U.S. 410, 416 (1979))); *id.* at 2263 (sovereign immunity is designed to protect "the dignity and respect afforded a State" (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997))); *id.* at 2264 (discussing petitioners' contention "that immunity from suit in federal court suffices to preserve the dignity of the States"); *id.* ("Private suits against nonconsenting States . . . present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties'" (quoting *Ex parte Ayers*, 123 U.S. 443, 505 (1887))).

195. *Alden*, 119 S. Ct. at 2289 (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ., dissenting); see also Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 132 (1996) (questioning the viability of the dignity rationale since "[t]he idea that a state, an utterly abstract entity, has feelings about being sued by a private party . . . surely strains credulity," and noting that the Court has elsewhere ruled "that states serve as functional entities in the constitutional context") (quoting *New York v. United States*, 505 U.S. 144, 181 (1992) ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities To the contrary, the Constitution divides authority between federal and state government for the protection of individuals.")).

As well, one would think that those who favor rules over standards might object to the Court's emphasis on the "dignity" of states as a basis for state immunity, since such a concept seems so vague as to set no constraint on ad hoc decisionmaking. Cf. *Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) (arguing that rules are necessary to guard against ad hoc judgment).

relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.”¹⁹⁶ According to this view, the Court must honor the Framers’ references to state dignity by preserving certain state prerogatives;¹⁹⁷ hence the *Alden* majority’s argument that “[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.”¹⁹⁸ For the purposes of this Article, it is unnecessary to decide whether either of these views of state dignity should play a role in sovereign immunity analysis, for tribal participation in suits brought by the United States remains justifiable, whether the dignity concept is seen as a proxy for functional goals or as an intrinsically important symbolic value.

Assuming that solicitude for state dignity is meant to prevent federal encroachment upon some state prerogatives, those prerogatives do not include freedom from suits by the United States to enforce federal law. In the view of the Court, the states’ consent to suit by the United States was necessary in order to ensure the supremacy of federal law¹⁹⁹ and to avoid

196. *Alden*, 119 S. Ct. at 2247. Similarly, the Court stated that the Constitution “reserves to [the states] a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.” *Id.*

197. See, e.g., *id.* at 2263 (“[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”).

198. *Id.* at 2247. Likewise, the Court appears to see state dignity as a protection against federal commandeering: state courts should not be forced to hear federal claims pressed by private plaintiffs against states, the *Alden* Court held, because that would “denigrate[] the separate sovereignty of the States.” *Id.* at 2264. State dignity may also be a shorthand for state autonomy; in arguing that private suits against states would interfere with states’ public policy decisions, the *Alden* Court warned of “substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States.” *Id.*

199. The supremacy of federal law requires that, in some respects at least, the sovereignty of the states must give way to the will of the federal government, for the contrary result would “invert[] . . . the fundamental principles of all government;” to have “the authority of the whole society everywhere subordinate to the authority of the parts” would create “a monster, in which the head was under the direction of the members.” THE FEDERALIST NO. 44, at 99 (Madison) (Isaac Kramnick ed., 1987).

Thus, “[t]he possibility of suits by the United States against the states is essential to our federal system. . . . ‘Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in all their sovereign capacity would be at the mercy of the states.’” United States *ex rel.* Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195, 213-14 (2d Cir. 1998) (Weinstein, J., dissenting) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1674, at 445 (1851)); see also, e.g., Erwin Chemerinsky, *Federalism Not as Limits, but as Empowerment*, 45 U. KAN. L. REV. 1219, 1219-20 (1997) (arguing that though one aspect of federalism is “protecting states,” “an equally—in fact, more—

extralegal methods of dispute resolution among the sovereign members of the federal system.²⁰⁰ The Framers “could not have overlooked the possibility that controversies capable of judicial solution might arise between the United States and some of the states,” and “the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law.”²⁰¹ Accordingly, from a functional viewpoint, once a state is sued by the federal government, its dignity is not implicated simply because in the course of the suit it must also respond to allegations by a non-federal intervenor. As the Court has noted, “a suit brought against a State by the United States [is] a situation in which state sovereign immunity does not exist.”²⁰²

Likewise, if the dignity concern is taken as a symbolic value, it is no more persuasive, for such a consideration has no application to suits by the United States and no resonance in the context of suits by Indian tribes. Revealingly, rhetoric concerning state dignity has focused instead on suits by private individuals.²⁰³ Thus, the Court has argued that “[t]he very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties.”²⁰⁴ As the

important aspect is protecting authority of the federal government”); cf. Henry Paul Monaghan, Comment, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102, 122 (1996) (noting the tension between state sovereign immunity and “national supremacy . . . which generally presumes that Congress can entrust enforcement of whatever rights it can validly create to the national courts”).

200. For an alternative reconstruction of the intent of the Framers, see Caminker, *State Immunity Waivers*, *supra* note 15, at 110-11 (discussed *supra* at note 94).

201. *United States v. Texas*, 143 U.S. 621, 644-45 (1892). In *Texas*, the Court held that since the Supreme Court has jurisdiction of suits between two states, it is also an appropriate tribunal for suits by the United States against a state. It has since been established that the United States can sue a state in the federal district courts, see, e.g., *United States v. California*, 297 U.S. 175, 188-89 (1936).

202. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2228 n.3 (1999) (citing *United States v. Texas*, 143 U.S. 621 (1892)). More specific functional concerns that may arise during such a suit are addressed in Part IV.B. below.

203. Similarly, many discussions concerning state sovereign immunity focus specifically on suits by private individuals; as Hamilton famously stated, “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” THE FEDERALIST NO. 81 (emphasis added; original emphasis omitted). In this regard it is notable that, in surveying background principles of state sovereign immunity, the majority opinion in *Alden* (and its quotes from other sources) referred well over a dozen times to “private” suits or suits by “individuals.” See *Alden v. Maine*, 119 S. Ct. 2240, 2247-54, 2260-64 (1999).

204. *Ex parte Ayers*, 123 U.S. 443, 505 (1887) (holding that the Eleventh Amendment applies to a suit against a state attorney general when the state is the real

Court has observed, “[t]he generation that designed and adopted our system considered immunity from private suits central to sovereign dignity.”²⁰⁵ During the debates on the Constitution, one of the main objections to the extension of the judicial power to controversies between a state and citizens of another state was that “it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to.”²⁰⁶

By contrast, claims brought against a state by the federal government do not implicate the symbolic dignity rationale. The Court first explicitly addressed the question of such suits in *United States v. Texas*, an original action brought by the federal government in the Supreme Court to establish the United States’ title to certain land claimed by the State of Texas.²⁰⁷ In finding jurisdiction over the action, the Court contrasted suits by governments with suits by individuals:

[Previous cases] in this court relating to the suability of states, proceeded upon the broad ground that ‘it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.’

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the states.²⁰⁸

The Court thus focused, not on the state’s dignity concerns, but on the fact that the constitutional plan must have contemplated that the United States could sue states in federal court.²⁰⁹ The only mention of state dignity in *Texas* comes in the Court’s explanation—of the statute granting the Supreme Court exclusive jurisdiction over certain “controversies of a civil nature where a state is a party”²¹⁰—that “it best comported with the

party in interest); see also, e.g., *Fitts v. McGhee*, 172 U.S. 516, 527-28 (1899) (quoting *Ayers*).

205. *Alden*, 119 S. Ct. at 2247.

206. “Brutus” XIII, reprinted in 2 *THE DEBATE ON THE CONSTITUTION* 222, 223 (Bernard Bailyn ed., 1993).

207. 143 U.S. 621, 630-31 (1892).

208. *Id.* at 645-46.

209. See *id.* at 644-45.

210. The grant of exclusive jurisdiction applied to “all controversies of a civil nature,

dignity of a state that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the nation.”²¹¹ This concern, however, is not of constitutional magnitude, and it has since been well established that the United States can sue a state in federal district court without offending the state’s dignity.²¹²

Because the relevant distinction, from the perspective of symbolic state dignity, is between suits by individuals and suits by governments, tribal suits raise no concerns.²¹³ “Tribes . . . are not private citizens, they are sovereigns. The affront to a state’s dignity by being haled into court by another sovereign is not of the same order of magnitude as when the case involves a private citizen (if there can be said to be an affront).”²¹⁴ Although the Court held in *Blatchford v. Native Village of Noatak* that the Eleventh Amendment extends to suits by Indian tribes, it did so on the basis that Indian tribes should be treated the same as foreign nations for Eleventh Amendment purposes.²¹⁵ Thus, even in establishing state sovereign immunity to certain tribal suits, the Court affirmed that “Indian tribes are sovereigns.”²¹⁶

where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.” Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

211. *United States v. Texas*, 143 U.S. 621, 643 (1892).

212. *See, e.g., United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (noting surprise “that the District Court entertained seriously the argument that the United States could not constitutionally sue a State”); *United States v. California*, 297 U.S. 175, 188-89 (1936) (rejecting the argument “that Congress did not intend to subject a sovereign state to the inconvenience and loss of dignity involved in a trial in a District Court”).

213. *Cf. Caminker, State Immunity Waivers, supra* note 15, at 105 (noting that “being haled into court by a ‘mere’ individual arguably poses a starker threat to a state’s dignity than being haled into court by a coequal or even superior sovereign”).

214. Beth Prinz, Casenote, *Expanding State Sovereignty: Idaho v. Coeur d’Alene Tribe of Idaho*, 35 IDAHO L. REV. 599, 638 (1999).

215. *See Blatchford*, 501 U.S. 775 (1991).

216. *Id.* at 780. Under federal law, Indian tribes remain “unique aggregations possessing attributes of sovereignty over both their members and their territory.” *Montana v. United States*, 450 U.S. 544, 563 (1981) (internal quotation marks omitted); *see also Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (noting that Indian tribes “exercise inherent sovereign authority over their members and territories”).

Indeed, the federal government recently reaffirmed its commitment to maintaining a “government-to-government” relationship with Indian tribes. *See, e.g., 25 U.S.C. § 3601(1)-(2)* (1994) (acknowledging the “government-to-government relationship between the United States and each Indian tribe” and stating that the federal government’s trust responsibility “includes the protection of the sovereignty of each tribal government”); White House Press Release, *President Clinton: A Record of Partnership with American Indians and Alaska Natives* (Aug. 6, 1998) (found July 10,

As the Court explained,

The relevant difference between States and foreign sovereigns . . . is . . . the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes.²¹⁷

In *Blatchford*—as in *Monaco v. Mississippi*, where the Court held that the Eleventh Amendment applies to suits by foreign sovereigns²¹⁸—the Court made no mention of state dignity, indicating that suits by tribal sovereigns implicate no such concern.²¹⁹

1999 at <<http://www.doi.gov/oait/docs/bcl.htm>>) (reviewing efforts by the Clinton Administration “to establish a true government-to-government partnership” with Indian nations); Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes (unsigned, undated version found July 10, 1999 at <<http://www.usdoj.gov/otj/sovtrb.html>>); President’s Memorandum for the Heads of Executive Departments and Agencies, *Government-to-Government Relations with Native American Tribal Governments* (April 29, 1994) (found July 31, 1999 at <<http://www.epa.gov/owindian/clinton.htm>>); see also *McSloy*, *supra* note 30, at 220 n.16 (citing earlier examples).

Moreover, on the same day in 1998 that the President issued an executive order on “Consultation and Coordination with Indian Tribal Governments,” see Exec. Order No. 13084, 63 Fed. Reg. 27,655 (1998), he also issued an executive order on “Federalism,” see Exec. Order No. 13083, 63 Fed. Reg. 27,651 (1998). The “Federalism” order’s provisions on federal-state relations parallel the “Consultation” order’s precepts regarding federal-tribal relations, and the “Consultation” order provides that it “shall complement the consultation and waiver provisions in sections 4 and 5 of the Executive order, entitled ‘Federalism,’ being issued on this day.” 63 Fed. Reg. 27,655 at Sec. 7(c). Although in August 1999 the President issued a revised order on “Federalism” that revoked Order No. 13083, see Exec. Order No. 13132, 64 Fed. Reg. 43,255 (1999), it is suggestive that the two orders, as originally issued, presented the question of federal relations with states in tandem with the question of federal relations with tribal governments.

Similarly, though the states frequently dispute the legal implications of tribal sovereignty, even they nonetheless acknowledge that it exists. See, e.g., Oregon Exec. Order No. EO-96-30, *State/Tribal Government-to-Government Relations* (May 22, 1996) (unsigned version found July 10, 1999 at <<http://www.governor.state.or.us/governor/legal/execords.htm>>); Jeffrey A. Modisett, *Discovering the Impact of the “New Federalism” on State Policy Makers: A State Attorney General’s Perspective*, 32 IND. L. REV. 141, 142 (1998) (article by Attorney General of Indiana, referring to “the competing sovereignties of states, Indian tribes, and the federal government”).

217. *Blatchford*, 501 U.S. at 782.

218. See *Monaco v. Mississippi*, 292 U.S. 313, 330 (1934).

219. Alternatively, the Court’s omission to mention state dignity—and the Court’s application of state sovereign immunity in cases brought by foreign nations and Indian tribes—could signal a general decline in the influence of the dignity rationale. Cf. Caminker, *State Immunity Waivers*, *supra* note 15, at 105-06 (discussing *Monaco* and

2. *The federal government and Indian tribes*

If the abstract notion of tribal sovereignty helps explain why *Arizona* intervention does not offend state dignity, the historical placement of Indian tribes within the federal system provides more specific support for the *Arizona* practice. In this respect, the early relations between the federal government and Indian tribes are doubly significant. *First*, they show that the United States immediately assumed a trust responsibility for the welfare of the tribes and with it both the ability to enforce the tribes' rights against the states and the obligation to afford the tribes a voice in the enforcement of those rights. *Second*, the United States' early dealings with Indian tribes help to explain why it was not until the 20th century that tribal intervention in suits by the federal government became a significant issue.

"With the adoption of the Constitution, Indian relations became the exclusive province of federal law,"²²⁰ and the new Nation lost no time in exercising this authority. Under the Articles of Confederation, certain states had attempted to acquire large amounts of Indian land through "treaties" with Indian tribes.²²¹ One of Congress's first acts after the Constitution was to pass the Indian Trade and Intercourse Act of 1790, one section of which (commonly known as the Nonintercourse Act) provides

[t]hat no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.²²²

Blatchford and arguing that the "dignity-based distinction between individual and sovereign plaintiffs has not withstood the test of time; during the past century the court has made clear that the background immunity principle covers both categories, and immunity waivers fall in both categories as well").

220. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). As the Court recently noted, "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause:" though the States "still exercise some authority over interstate trade[, they] have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996).

221. At least one circuit court has concluded that the Articles of Confederation did not prohibit such treaties. See *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1167 (2d Cir. 1988).

222. Act of July 22, 1790, § 4, 1st Cong., 2d Sess. Chap. 33, 1 Stat. 137, 138.

This provision and its successors²²³ require that land acquisitions from Indian tribes be ratified by a federal treaty entered into by the President with the advice and consent of the Senate.²²⁴

From the earliest days of the Union, the federal government's assumption of plenary responsibility for Indian relations created a trust relationship between the United States and Indian tribes.²²⁵ President Washington explained the Nonintercourse Act to a group of Seneca Indians in the following terms:

Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will not consent to your being defrauded, but it will protect you in all your just rights.²²⁶

Decades later, Chief Justice Marshall would reaffirm the United States' trust responsibility to Indian nations:

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, and manifest a firm purpose to afford that

223. See Act of March 1, 1793, 1 Stat. 329 (renewal); Act of May 19, 1796, 1 Stat. 469 (renewal); Act of March 3, 1799, 1 Stat. 743 (renewal); Act of March 30, 1802, 2 Stat. 139 (permanent enactment); Act of June 30, 1834, 4 Stat. 729 (enacting statute in substantially its current form), *codified as carried forward at* 25 U.S.C. § 177.

224. See *Cayuga Indian Nation v. Cuomo*, 730 F. Supp. 485, 489 (N.D.N.Y. 1990).

225. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Of course, to recognize the federal government's trust obligations is not to suggest that it always fulfilled them. Arguably, the federal trust relationship manifests merely the softer side of the colonizing power—the product of “an ambiguous heritage of ‘a conqueror with a conscience.’” Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1755 (1997) (quoting Frank Pommersheim, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 9 (1995)). Moreover, the trust doctrine's effects on Native Americans have sometimes been far from benign. See, e.g., Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 2 (1991) (“The federal government has often justified its coercive interference with the property and sovereignty of American Indian nations by claiming to be acting in good faith exercise of its trust responsibilities toward American Indians.”). The problems inherent in the federal trust doctrine, however, are beyond the scope of this Article; and as far as the federal structure is concerned, dereliction on the part of the United States diminishes neither its duties to Indian tribes nor its powers vis-a-vis the states.

226. The reply of the President of the United States to the speech of the Cornplanter, Half-Town, and Great-Tree, Chiefs and Councillors of the Seneca nation of Indians, December 29, 1790, 4 AMERICAN STATE PAPERS 142 (Class II, Indian Affairs) (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832) (emphasis added).

protection which treaties stipulate. [These acts] manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.²²⁷

Clearly, the United States assumed this trust responsibility in the exercise of its sovereign powers. The Nonintercourse Act, one of the federal government's earliest measures to protect the rights of Indian tribes, is a law of general application that binds the states and explicitly requires that land transactions with Indian tribes be made only by federal treaty. Likewise, the United States' trust obligations also arise from treaties with the Indian tribes, into which the United States entered as a sovereign—or rather, as *the* sovereign, for the United States is the only non-native sovereign within this country's borders with the constitutional capacity to treat with Indian nations. Finally, the federal power to honor the trust includes the power to enforce federal law against the states. Thus, for example, in *United States v. Minnesota*,²²⁸ when the federal government sued Minnesota to cancel patents issued to Minnesota for certain tribal lands,²²⁹ the Court concluded that "the United States has a real and direct interest in the matter presented . . . [arising] out of its guardianship over the Indians, and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations"²³⁰—and held that this interest "is one which is vested in [the United States] as a sovereign."²³¹

Key among the United States' sovereign responsibilities to Indian nations is its duty—and authority—"to do all that [is] required . . . to prepare the Indians to take their place as

227. *Worcester v. Georgia*, 31 U.S. 515, 556-57 (1832).

228. 270 U.S. 181 (1926).

229. *See id.* at 191-92.

230. *Id.* at 193-94; *see* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 308 (2d ed. 1982) (hereinafter *FEDERAL INDIAN LAW*) (noting courts' view that when the United States sues to enforce tribal rights it sues "on its own behalf, as well as on behalf of the Indians, to protect its guardianship and to fulfill its trust obligations").

231. *Minnesota*, 270 U.S. at 194; *cf.* *Virginia v. West Virginia*, 220 U.S. 1, 34 (1911) (allowing Virginia to assert a claim on behalf of bondholders among her citizenry, because Virginia and West Virginia were both obligated on the debt in question and thus West Virginia's agreement to bear an equitable share of the debt was "a contract in the performance of which the honor and credit of Virginia is concerned").

independent, qualified members of the modern body politic.”²³² Concededly, the nation’s early policies may not have implemented this goal; but at least the structure of the early relations among the federal, state and tribal governments tended to involve the tribes, to some degree, in determinations that affected them. In the late 18th and early 19th centuries the Constitution, and the Nonintercourse Act, provided that major transactions between Indian tribes and non-native governments should take place by federal treaty and thus, by definition, should involve both the United States and the relevant Indian tribe.²³³ The Constitution gives the federal government the exclusive right to enter into treaties with Indian tribes,²³⁴ and the United States at first made extensive use of this right: by 1846, the official compilation of federal treaties with Indian tribes filled an entire volume of the United States Statutes at Large.²³⁵

Towards the end of the 19th century, however, treaty-making with Indian tribes fell victim to internecine congressional politics. In 1871, Congress decided to end the “practical exclusion” of the House of Representatives “from any policy role in Indian affairs” by requiring that Indian policy be set by bicameral legislation rather than by treaties entered into by the Executive branch with the advice and consent of the Senate.²³⁶ Accordingly, it passed a law providing that

hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an

232. Board of County Comm’rs v. Seber, 318 U.S. 705, 715 (1943).

233. Cf. James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 583 (1994) (noting the view that obtained “during and subsequent to the Revolutionary period” that “[d]isputes between sovereign nations were to be resolved not through judicial process but through the negotiation of treaties, the exchange of ambassadors, and, if necessary, through war”); *id.* n.105 (“It was these methods of resolving disputes, of course, that the Constitution forbade to the states.”).

234. See U.S. CONST. art. II, § 2, cl. 2; *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (In addition to the Indian Commerce Clause, federal authority over Indian affairs also arises from “the powers of war and peace [and] of making treaties.”).

235. See 7 Stat. 1-604 (1846); J. Res. 10 of Mar. 3, 1845, 5 Stat. 799 (1845) (directing the compilation of “all Treaties with . . . Indian tribes”). The editor’s note to the compilation observed that “[t]he constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties.” *Indian Treaties*, 7 Stat. 9 (1846) (citing *Worcester*).

236. *Antoine v. Washington*, 420 U.S. 194, 202 (1975).

independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.²³⁷

Given that throughout the 80 years prior to the passage of this act the federal executive had concluded numerous treaties with Indian nations and the federal courts had upheld and enforced those treaties, the 1871 act's pronouncements on the constitutional status of Indian nations were a striking departure.²³⁸ But as one commentator has noted,²³⁹ if the act's characterization of Indian nations raised one issue of departmental authority—by placing Congress in the role of constitutional interpreter²⁴⁰—it was likely designed to sidestep another—by masking the act's arrogation to Congress of a portion of the treaty-making power.²⁴¹

In any event, by the end of the 19th century the locus of power over Indian affairs moved from a treaty setting—in which the Indian nations had at least a nominal place²⁴²—to a legislative setting in which the Indian nations had no formal role²⁴³ and a judicial setting in which the role of Indian tribal

237. Act of Mar. 3, 1871, 16 Stat. 544, 566, *codified as amended at* 25 U.S.C. § 71 (1994).

238. See McSloy, *supra* note 30, at 243 (noting that “[f]or nearly a century of American national experience, and several prior centuries of European experience, treaties had been the formal mode of diplomatic relations with the Indians”).

239. See *id.* at 243 n.196.

240. See *id.* (arguing that the Act's purported interpretation of the constitutional term “foreign nation” raised a separation of powers issue, “particularly since the Supreme Court had already addressed precisely that constitutional definition in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)”).

241. See *id.* (“That the House of Representatives sought to redefine its jurisdiction, not by explicitly seeking to include treaty ratification within its powers but instead by declaring that Indian nations could no longer be recognized, shows that Congress understood that it was changing the constitutional scheme and sought to handle the politically sensitive issue through semantic subterfuge.”).

242. On the other hand, it is well known that “[t]reaties [with Indian tribes] were sometimes consummated by methods amounting to bribery, or signed by representatives of only small parts of the signatory tribes. In accordance with the general rule applicable to foreign treaties, however, the courts will not inquire into whether an Indian tribe was properly represented during negotiation of a ratified treaty or whether such treaty was procured by fraud or duress.” *FEDERAL INDIAN LAW*, *supra* note 230, at 63.

243. For a time after 1871, “the federal government continued to enter into ‘agreements’ with Native American tribes”—though such agreements now required the approval of both houses of Congress—but “[t]he last such agreement was entered into in 1902.” Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7

litigants was unclear. Eventually, in the 20th century, Congress would make explicit its intent for Indian tribes to be able to sue to enforce their rights in federal court; but in the meantime, the Court had begun its drastic expansion of state sovereign immunity.²⁴⁴

This history suggests why *Arizona* intervention is a creature of the 20th century: not because it is a departure from the federal structure conceived by the Framers, but because it is a modern manifestation of the very system they envisioned—a system in which the federal government, jointly with the Indian tribes, participates in the determination of Indian rights.

3. *The practices of the Court*

On a more pragmatic level, *Arizona* follows a long tradition in which litigants have been allowed to intervene or otherwise participate in suits against states. Such participation, as the cases make clear, need not offend a state's immunity.

*Maryland v. Louisiana*²⁴⁵ provides a modern illustration of this principle. The dispute in *Maryland* concerned a Louisiana tax (levied on pipeline companies) on the "first use" of any natural gas imported into Louisiana which was not previously taxed by another state or the United States.²⁴⁶ Claiming that this tax was unconstitutional, eight states filed an original action in the Supreme Court against Louisiana, seeking declaratory and injunctive relief and a refund of taxes already paid.²⁴⁷ In addition to the eight plaintiff states, the forces

ST. THOMAS L. REV. 567, 580 (1995). "With both houses of Congress involved, it did not take long for Congress to move from approving executive actions (the Indian 'agreements' which now substituted for treaties) to initiating its own legislation." McSloy, *supra* note 30, at 244. Though in 1924 "all non-citizen Indians born within the territorial limits of the United States" were "declared to be citizens of the United States," Act of June 2, 1924, ch. 233, 43 Stat. 253, Indian nations continue to lack the "procedural protections" available to the states: "They do not enjoy senatorial representation nor do they send delegations to the House of Representatives. They often do not even enjoy de facto protections, as congressional districts often cut across tribal lines and reservation boundaries, states resist Indian voting rights, and language barriers inhibit the franchise." McSloy, *supra* note 30, at 260-61 (footnotes omitted).

244. See *Hans v. Louisiana*, 134 U.S. 1 (1890).

245. 451 U.S. 725 (1981).

246. See *id.* at 731, 736.

247. See *id.* at 734. The Court held that the states were entitled to sue because they themselves were substantial purchasers of gas, and because the challenged practice affected their general populations "in a substantial way," giving them an interest in suing "as *parens patriae*." *Id.* at 737.

arrayed against Louisiana included 17 pipeline companies,²⁴⁸ which the Court allowed to intervene because they had “a direct stake in this controversy and in the interest of a full exposition of the issues.”²⁴⁹ Accordingly, Louisiana was forced to contend with—at a minimum—three separate opposing counsel: one for the United States,²⁵⁰ at least one for the plaintiff states and at least one for the pipeline companies.

In this respect, *Maryland* was hardly atypical, even among cases involving state defendants.²⁵¹ In particular, a number of cases brought by the United States involving Indian tribes²⁵² illustrate that tribal litigants have taken the opportunity to make distinct additional arguments not presented by the United States,²⁵³ without imposing undue burdens or creating problems

248. See *id.* at 734.

249. *Id.* at 745 n.21. The Court also noted “that it is not unusual to permit intervention of private parties in original actions,” but lest this suggest that it was drawing a distinction between such actions and those that originate in the district court, one of the two cases it cited was *Trbovitch v. United Mine Workers*, 404 U.S. 528 (1972), in which the Court held that intervention should have been permitted in the district court.

250. The Court also permitted the United States and the Federal Energy Regulatory Commission to intervene as plaintiffs, see *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981).

251. In *Oklahoma v. Texas*, 258 U.S. 574 (1922), for example, the Court held that individuals could intervene in an original action between the named states concerning state boundary lines and the title to a river bed, because the Court had appointed a receiver to take possession of the disputed territory, see *id.* at 578, 580-81. As the Court explained, the individuals’ claims “for particular tracts and funds in the receiver’s possession and exclusively under our control” could not be brought before any other authority, and such claims “may be dealt with as ancillary to the suit wherein the possession is taken and the control exercised—and this although independent suits to enforce the claims could not be entertained in the court,” *id.* at 581. Regardless of whether this holding is affected by the Court’s statements in *Pennhurst* concerning pendent jurisdiction, see *supra* notes [174-81] and accompanying text, *Oklahoma* still stands as another illustration that the participation of individuals in suits against states is perfectly workable.

Similarly, in *Virginia v. West Virginia*, 220 U.S. 1 (1911), the Court allowed counsel for individual bondholders to participate as *amicus curiae* in Virginia’s suit to force West Virginia to bear an equitable share of the bond debt, see *id.* at 10. And in *North Carolina v. Tennessee*, 235 U.S. 1 (1914), a boundary suit between the two states, the reporter noted that an individual had filed a brief “[b]y leave of court,” *id.* at 2.

252. See, e.g., *United States v. Montana*, 604 F.2d 1162, 1163-64 (9th Cir. 1979) (adjudicating appeal by United States and plaintiff-intervenor tribe), *rev’d on other grounds*, 450 U.S. 544, 546, 568 (1981) (United States and Crow Tribe were also represented by separate counsel before the Supreme Court); *United States v. Michigan*, 623 F.2d 448, 449 (6th Cir. 1980) (per curiam) (two Indian tribes intervened in United States’ suit to enforce treaty fishing rights and were separately represented as intervenors), *order modified on other grounds*, 653 F.2d 277 (6th Cir.).

253. For example, in *United States ex rel. Cheyenne River Sioux Tribe v. South Dakota*, 105 F.3d 1552 (8th Cir. 1997), the Cheyenne River Sioux Tribe intervened in an

of judicial administration.

B. *Arizona and the Court's Functional Concerns*

That the formal assessments outlined above lead back to functional questions should not be surprising, for as the *Alden* Court emphasized, its views of form rest on substantive foundations.²⁵⁴ In the present context, the results of the functional analysis corroborate those of the formal inquiry, for both the United States' role in *Arizona* suits and the unique relationship between federal and tribal governments justify the use of *Arizona* intervention.

1. *The role of the federal plaintiff*

With respect to the *Alden* Court's functional analysis, *Arizona* suits start out with an obvious advantage over the *qui tam* suits discussed above: in an *Arizona* suit, by definition, the United States is an actual party plaintiff. The United States' presence in the suit, as will be seen below, addresses each of the *Alden* Court's substantive concerns about suits against states.

a. *Control*

In the crudest terms, to the extent that the *Arizona* theory is the sole basis for piercing a state defendant's sovereign immunity to a tribe's damages claims, the United States appears to have veto power over those claims. By dismissing its own claim, the federal plaintiff could give the state the opportunity to assert sovereign immunity to the claims of the tribe.²⁵⁵ Of course, such power might seem to result in a blunt,

action in which the United States sought declaratory, injunctive and compensatory relief against South Dakota with respect to that State's imposition of an excise tax and registration fee on Indians living within reservation boundaries. *See id.* at 1554, 1555 & n.5. The Court of Appeals held that the district court should not have rejected the claim for damages pressed by the United States and the Tribe, since "[t]he Eleventh Amendment does not apply . . . because the United States brought the action." *Id.* at 1560. Significantly, on appeal the Tribe, but not the United States, pressed the claim that South Dakota's excise tax should not apply to nonmember Indians residing on the Tribe's reservation; and though the Court ultimately rejected the Tribe's contention, it did so after a consideration of the merits. *See id.* at 1559-60.

254. *See Alden v. Maine*, 119 S. Ct. 2240, 2264 (1999) ("Underlying constitutional form are considerations of great substance."); *id.* at 2268 ("[I]n a Constitution as resilient as ours form mirrors substance.").

255. If the United States were able to dismiss its claim with prejudice, the state defendant might also contend that the judgment dismissing the United States' claim bars the tribal plaintiff's claim on principles of *res judicata*. *See Nevada v. United*

all-or-nothing kind of control; but in practice the tribal plaintiffs are likely to work cooperatively with the federal plaintiff, not just because of common interests but also out of awareness that to assert the *Arizona* doctrine they need the United States in the case. Also, to the extent that the federal trust responsibility to the tribal plaintiff would constrain the United States' ability to dismiss its claims against the state,²⁵⁶ that trust obligation

States, 463 U.S. 110, 135 (1983) (Indian tribe "whose interests were represented . . . by the United States, can be bound by the . . . decree"). But such a rule is appropriate, if at all, only where the United States has asserted the tribe's claim, not tried to expunge it. See, e.g., *Sanguine, Ltd. v. United States Dep't of Interior*, 798 F.2d 389, 390, 392 (10th Cir. 1986) (noting that "intervention was proper because the government not only inadequately represented the Indian lessors whose interests were entrusted to it but also 'in effect conceded the case at the outset,'" and holding that "[s]ince the intervenors were not adequately represented in the first instance, the principle of res judicata does not apply to them"). A contrary outcome would raise—among other concerns—separation of powers issues, for if a dismissal of the federal government's suit barred the tribal plaintiff's suit, the Executive branch would have the ability to extinguish whole causes of action created by Congress for Indian tribes.

A more difficult question—in light of *Nevada*—arises if the United States does not simply seek dismissal of its claim, but rather seeks dismissal as part of a settlement in which value flows to the tribe. *Nevada*, for instance, concerned the preclusive effect of a decree entered pursuant to a settlement agreement to which the United States—but not the relevant Indian reservation—was a party. Significantly, the settlement decree awarded the reservation considerable water rights, see *Nevada*, 463 U.S. at 117. Thus, the Court's holding in *Nevada*—that the reservation was bound by the settlement decree—should at least be limited to instances where the judgment arises from a settlement that provides significant value to the tribal plaintiff.

Moreover, the *Nevada* Court's refusal to examine the adequacy of the United States' representation of the reservation's interests is in tension with the *Arizona* Court's determination that an Indian tribe should be allowed to participate in the determination of its rights. In the non-Indian context, the Court has made clear that considerable care is necessary to safeguard the interests of class members purportedly represented in the negotiation of a settlement agreement. See *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2315 (1999); *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2252 (1997). It would be worse than ironic if a different result were to obtain in the Indian law context on the basis of the federal government's trust obligation to Indian tribes.

In any event, in practice this question can, and should, be avoided. Once the defendant has answered, under Rule 41 a voluntary dismissal requires either a stipulation signed by all parties, or an order of the court. See *FED. R. CIV. P.* 41(a). The tribal plaintiff can obviously block the former, and when the latter is requested, the court can simply provide in its order that the dismissal is without prejudice. This should not offend separation of powers principles, because the only discretion the court would be removing from the executive branch is the discretion to compromise a tribal claim against the wishes of the tribe; and such discretion itself, as discussed above, raises separation of powers concerns.

256. Compare *Chemehuevi Indian Tribe v. Wilson*, 987 F. Supp. 804, 809 (N.D. Cal. 1997) (holding that the United States had a fiduciary duty to sue California on behalf of the tribes to enforce the provisions of the Indian Gaming Regulatory Act because "absent representation, the Tribes will have no legal remedy with which to bring the State to the bargaining table and obtain the benefits of IGRA"), with *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1477-78 (D.C. Cir. 1995) (holding that the Attorney General had

would obtain whether or not the tribal plaintiff was in the suit. Accordingly, in an *Arizona* case the United States has as much ultimate control over the conduct of the suit as it would if it were the only plaintiff.

b. Accountability

In an *Arizona* suit, the United States, as an actual plaintiff, cannot avoid political accountability for the claims against the state. This fact helps explain why, as discussed in Part V.B. below, state sovereign immunity should not bar a tribal plaintiff from seeking more extensive relief than the United States requests. Of course, the Court has stated that “the impetus for the Eleventh Amendment” was the “prevention of federal-court judgments that must be paid out of a State’s treasury.”²⁵⁷ But in practical terms, the United States—which clearly has the right to seek relief from the state to the fullest extent allowed by law—is politically accountable, not only for the relief it seeks from the state, but also for the relief that its presence enables the tribe to seek from the state. Those affected by the claims for relief are unlikely to absolve the United States of responsibility for the demands of the tribal co-plaintiff, especially in cases where it is only the presence of the United States that enables the tribe’s damages claims to proceed against the state.

c. Influence

The Court has, on occasion, expressed concern that if individuals were permitted to sue states, “the course of [the states’] public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals, without their consent, and in favor of

discretion to refuse to assert water rights claims on behalf of the Shoshone-Bannock Tribes); *id.* at 1484 (Rogers, J., and Wald, J., concurring) (noting that “as the federal government’s trust responsibility toward a particular tribal resource increases in scope, the Attorney General’s prosecutorial discretion contracts”).

257. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). The Court has further held that “it is the [state] entity’s potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant.” *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 431 (1997). To the extent that the Court’s reasoning rests on the thought that liability visited on an insurer or the like would eventually raise the state’s costs of insuring, this holding still implicates the immunity-from-liability theory; but to the extent that it rests on the view that the state should be immune from purely symbolic legal liability regardless of any effect on state coffers, it appears to circle back to the dignity interests discussed in Part IV.A.1. above.

individual interests.”²⁵⁸ In this view, the “constitutional system of cooperative federalism” disfavors suits that “interfere with [a state’s] capacity to fulfill its own sovereign responsibilities.”²⁵⁹ Here, again, *Arizona* raises no concerns. If the federal system affords states latitude to operate freely within their spheres of sovereignty, it does not grant them license to violate federal law;²⁶⁰ and while individuals may not be able to sue states to enforce this demarcation, it is well established that the United States can.²⁶¹ In sum, state sovereignty does not prevent the United States from disrupting a state’s conduct of its own affairs by suing to enforce federal rights.

In fact, *Arizona* suits serve the principles of “cooperative federalism” by ensuring that the Executive branch will be in a position to exert influence and—potentially—mediate disputes between the tribal plaintiff and the state defendant. As a plaintiff, the United States will likely be a party to any settlement negotiations and will be intimately knowledgeable about the status of the suit. This involvement will often give it the opportunity to use its influence with the various participants to try to reach a negotiated resolution.

d. Judgment

In an *Arizona* case, the claims against the state defendant will be screened by the federal government. While the tribal plaintiff may, as discussed in Part V.D. below, press alternative theories and seek additional relief, the tribal claims against the state defendant must arise from the same transaction as the claims by the United States. As a practical matter, this rule satisfies the *Alden* concern with federal discretion, by ensuring

258. *Ex parte Ayers*, 123 U.S. 443, 505 (1887); see also *Alden v. Maine*, 119 S. Ct. 2240, 2265 (1999) (“If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.”); but see *id.* at 2289 n.36 (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ., dissenting) (arguing that the Court’s position “comes perilously close to legitimizing political defiance of valid federal law”).

259. *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979) (holding that a suit arising from a Nevada employee’s traffic accident occurring outside Nevada would not interfere with Nevada’s fulfillment of those responsibilities and thus this concern did not bar such a suit against Nevada in California state court).

260. See, e.g., *Alden*, 119 S. Ct. at 2266 (state sovereign immunity “does not confer upon the State a concomitant right to disregard the Constitution or valid federal law”).

261. See *supra* notes [199-201] and accompanying text.

that the federal plaintiff will be able to sift through the facts and decide which transactions to sue upon.

e. Burdens

In an *Arizona* suit, the United States must commit its own resources and shoulder all the obligations of a litigant. It must allocate the funds necessary to pay the costs of litigation. It must abide by the same discovery rules as any other litigant. It is subject to the disciplinary authority of the court. In short, the federal plaintiff in an *Arizona* suit must “put its money where its mouth is.”

2. Fulfilling the trust relationship

Arizona suits, then, fit the paradigm for federal suits against states, and as such they avoid the bar of state sovereign immunity. To end the analysis there, however, would be to ignore additional reasons why *Arizona* intervention is uniquely appropriate to suits involving claims on behalf of Indian tribes. Specifically, one of the most important aspects of *Arizona* intervention is its potential to aid the United States in fulfilling its sovereign commitment to the Indian tribes by empowering the tribes to participate in the assertion of their rights. The “proper fulfillment of [the United States’] trust require[s] turning over to the Indians a greater control of their own destinies.”²⁶² Thus, in *Arizona*, the Court justified the tribes’ intervention by noting that “the Indians are entitled ‘to take their place as independent qualified members of the modern body politic,’” and that “[a]ccordingly, the Indians’ participation in litigation critical to their welfare should not be discouraged.”²⁶³ In this respect, *Arizona* intervention directly promotes the United States’ assertion of its sovereign interest in the fulfillment of its trust obligation.²⁶⁴

Arizona intervention furthers the United States’ fulfillment of its trust obligations by allowing the tribes to monitor and supplement the government lawyers’ advocacy. Though the

262. *Morton v. Mancari*, 417 U.S. 535, 553 (1974).

263. *Arizona*, 460 U.S. at 615 (quoting *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968)).

264. *Cf. United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 882-83 (D.C. Cir. 1999) (noting that “the United States’ very ability to sue as the tribes’ trustee, which was unquestioned in *Blatchford*, depended on an injury to the United States as sovereign when injury was inflicted on the tribes”).

United States has the potential to be a powerful guardian, it is also often a conflicted one, for it represents many interests in addition to, and sometimes in opposition to, those of Indian tribes.²⁶⁵ And though the Court is willing, of necessity, to tolerate the United States' concurrent representation of diverse interests,²⁶⁶ it has noted Congress's concern with "situations in which the United States suffered from a conflict of interests or was otherwise unable or unwilling to bring suit as trustee for the Indians."²⁶⁷ Thus, the Court has emphasized that the assertion of Indian rights "should not depend on the good judgment or zeal of a government attorney."²⁶⁸

Arizona itself is a case in point. In that case, the Tribes sought leave to intervene to assert rights that the United States had failed to press on their behalf.²⁶⁹ Not only had the United States omitted to present these claims, but initially it even opposed the Tribes' intervention.²⁷⁰ And when, later, the federal government dropped its resistance to the Tribes' intervention and joined forces with them in pressing their claims, its claims on behalf of each Tribe were, in almost every instance, significantly smaller in scope than those asserted by the Tribes' attorneys.²⁷¹ These differences, far from raising an immunity issue, were rightly seen by the Special Master to weigh in favor of tribal intervention.²⁷²

It is of course true that the "conflicts" rationale for tribal

265. See, e.g., Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes (unsigned, undated version found July 10, 1999 at <<http://www.usdoj.gov/otj/sovtrb.htm>>) ("The Department represents the United States, in coordination with other federal agencies, in litigation brought for the benefit of Indian tribes and individuals, as well as in litigation by Indian tribes or individuals against the United States or its agencies. In litigation as in other matters, the Department may take actions and positions affecting Indian tribes with which one or more tribes may disagree.").

266. See *Nevada v. United States*, 463 U.S. 110, 128 (1983) ("[I]t is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well.").

267. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559 n.10 (1983) (discussing Congress's reasons for passing 28 U.S.C. § 1362); see *id.* at 557 (noting "the fact that the Indians . . . might not be adequately represented by the United States in state court in light of conflicts of interest between the Federal Government's responsibilities as trustee and its own claims to water").

268. *Poafpybitty*, 390 U.S. at 374.

269. See *Arizona*, 460 U.S. at 612.

270. See *id.*

271. See Special Master Report, *supra* note 150, at 3 & n.6.

272. See *id.* at 11.

intervention may sometimes be in tension with the Court's view that suits by the United States against a state are permissible in part because the federal plaintiff is politically accountable for its actions. In certain situations, this very political accountability might result in pressure on the federal plaintiff to abandon an unpopular position which it is asserting on behalf of the tribe, and the tribe's ability to assert the position for itself might then be seen as neutralizing the effects of the government's political accountability. However, this concern is counterbalanced by two important considerations. *First*, the tribes' ability to assert positions that others press the United States to abandon may provide the tribes with an opportunity to demonstrate the merit of those positions and thus to inform the decision ultimately reached by the federal plaintiff.²⁷³ Though the Court may value the fact that the federal plaintiff is politically accountable, such accountability is not diminished by an opportunity for full consideration of the tribe's position. *Second*, in cases where there is no other basis on which the tribal plaintiff can seek damages against the state, the federal plaintiff retains ultimate control over the claim against the state.²⁷⁴

In addition, the "accountability" argument should be considered in context. The Court's concern in *Alden* that a "politically responsib[le]" federal plaintiff exercise "control" over the litigation notwithstanding,²⁷⁵ there is little apparent value in precluding a court from hearing the full range of valid arguments in support of the asserted claims. If a federal plaintiff fails to make an important argument—either because of a conflict of interest or because of a lack of resources or intimate knowledge of the tribe's interests—the tribal plaintiff's presence in the suit ensures that the tribe has the opportunity to inform the court of its view. To be sure, the state defendant benefits if the plaintiffs, collectively, omit a potentially winning argument; but surely sovereign prerogatives do not include the right to hoodwink a court.

Similarly, a state's wish to avoid the burdens of litigation²⁷⁶

273. Cf. Resnik, *supra* note 21, at 757 (suggesting that one who values the dialogue between federal and tribal governments "would be supportive of enabling two voices, of cohabitation rather than domination, of having governments with different 'interests' and 'ideology' thus enabling 'innovation'").

274. See Part IV.B.1.a. above.

275. *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999).

276. Qualified immunity has been justified on the grounds that the specter of

should not enable it to muzzle those who can provide useful information to the court. Although the Court has intimated that sovereign immunity may serve to protect states from litigation burdens,²⁷⁷ the weight of this rationale is unclear because the Court customarily adverts to more amorphous dignity concerns as well. As the Court recently stated, while Eleventh Amendment immunity “is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States’ dignitary interests can be fully vindicated.”²⁷⁸ The Court’s habitual resort to the dignity rationale may have allowed it to avoid considering fully whether the “burden” concern is apposite in questions of state—as opposed to individual—immunity.

In any event, the state can have no legitimate complaint about the burdens imposed by a suit by the United States;²⁷⁹ and the *Arizona* case demonstrates that no undue additional burden is posed by tribal intervention. In *Arizona*, the Court permitted the assertion of claims by five separate tribes—apparently represented by at least three different counsel²⁸⁰—in addition to the United States. The Special Master rejected the states’ argument “that representation of the Tribes’ interests by both

litigation could chill government employees in the exercise of their duties and deter others from seeking government employment. Individual defendants may well face personal stigma and familial stress from being sued; their limited personal resources will likely render them risk-averse with respect to the outcome of the suit; and these and other effects of the suit will likely distract them from their work. See *Green v. Brantley*, 941 F.2d 1146, 1150 (11th Cir. 1991) (en banc) (holding that refusal to grant a defendant summary judgment based on qualified immunity is immediately appealable under the collateral order doctrine, even if an additional damages claim will proceed to trial anyway).

But whatever the merits of this concern as applied to individuals, its persuasiveness diminishes markedly when invoked as a justification for state sovereign immunity, for a state is better able to defend suits, and less likely to be affected by their pendency, than is an individual official. Cf. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 150 (1993) (Stevens, J., dissenting) (distinguishing the right of immediate appeal of denials of qualified immunity as based on the concern that “the specter of a long and contentious legal proceeding in and of itself would inhibit government officials from exercising their authority with the freedom and independence necessary to serve the public interest”).

277. See *Puerto Rico Aqueduct*, 506 U.S. at 147.

278. *Id.* (holding that a denial of Eleventh Amendment immunity is immediately appealable under the collateral order doctrine).

279. The general proposition stated in *Puerto Rico Aqueduct* that the Eleventh Amendment prevents the states from being subjected “to the coercive process of judicial tribunals at the instance of private parties,” 506 U.S. at 146 (internal quotation marks omitted), applies by its own terms to “private” suits and not to claims asserted by the United States.

280. See Special Master Report, *supra* note 150, at 9 n.16.

the Tribes themselves and the United States will prejudice the State parties by causing duplication, delay, and confusion,”²⁸¹ reasoning that the states’ concerns could be addressed by ensuring that the “order of proof and examination” were “structured in a logical sequence which avoids duplication or accumulation.”²⁸²

In fact, *Arizona*’s view accords with the long practice in the federal courts of allowing parties to intervene or otherwise participate in suits against states.²⁸³ Likewise, since the claims of *Arizona* intervenors will concern the same transactions put at issue by the United States’ claims²⁸⁴ and since district judges have ample ability to shape the presentation of the issues and avoid cumulative arguments and evidence,²⁸⁵ the tribal intervenor’s presentation will increase the state’s litigation burdens only to the extent that it bears upon the matters already before the court. Any right a state may have to be free of litigation burdens does not, surely, include a right to circumscribe the facts and law presented in support of the government’s claims.²⁸⁶

Finally, tribal participation in federal suits against states, to the extent it aids the presentation of the issues, can be seen as one way to strengthen federal protections in an area that suffers from chronic underenforcement of federal rights. As a general matter, the Court’s view of state sovereign immunity is colored by its “unwilling[ness] to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.”²⁸⁷ Since “[t]he States and their officers are bound by obligations imposed by the Constitution and by federal statutes,” any shortfall in federal enforcement capabilities is

281. *Id.* at 14.

282. *Id.* at 16.

283. *See* Part IV.A.3. above.

284. *See* Part V.B. below.

285. *See* Part V.D. below.

286. *See, e.g.,* David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 746 (1968) (noting with respect to agency proceedings that “the very fact that the intervener—from the vantage point of his own interest—sees the case with a perspective and perhaps an intensity different from that of the agency charged with the protection of the public as a whole may indicate that he can in fact contribute to the court’s total understanding”); THE LAWYER’S CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-23 (noting that “[t]he complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause,” and noting that this presentation is a requisite of the adversary system).

287. *Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999).

counterbalanced by “[t]he good faith of the States.”²⁸⁸ In the context of Indian law, however, the states’ good faith has all too often been remarkable for its absence. Indeed, the first Congress passed the Nonintercourse Act specifically to protect Indian tribes from fraudulent land transactions, many of which were perpetrated by the states themselves. Nearly a century afterward, the Court would note that “[b]ecause of the local ill feeling, the people of the states where [Indian tribes] are found are often their deadliest enemies.”²⁸⁹ Even today, federal courts grapple with the continuing effects of the states’ “highhanded attitude” in dealing with Indian tribes “throughout history.”²⁹⁰

Accordingly, in the unique context of Indian law, *Arizona* intervention is more than permissible: it is necessary.

V. ARIZONA IN PRACTICE

Arizona intervention, thus, is doctrinally justified even under the current Court’s expansive views of state sovereign immunity. This section examines several of the procedural questions that may arise in connection with *Arizona* intervention.

A. Does it Matter Who First Brings the Claim?

Although this Article refers to *Arizona* intervention as shorthand for the tribal participation approved in *Arizona*, the *Arizona* question may arise in a number of procedural contexts. Whether those permutations give rise to the same result should depend on their functional similarity to *Arizona*, rather than on mere formal distinctions.

Litigation commenced by the United States is perhaps the simplest case, for the intervention of a tribal plaintiff in an existing suit by the United States, pursuant to *Arizona*, obviously does not enlarge the court’s jurisdiction. Likewise, litigation commenced jointly by the United States and a tribe raises no special issues under *Arizona*. And where the United States has intervened in an existing tribal suit against private entities, and the federal and tribal plaintiffs move concurrently to amend their respective complaints to add state defendants,

288. *Id.*

289. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

290. *Cayuga Indian Nation v. Pataki*, No. 80-CV-930 & 80-CV-960, 1999 WL 224615, at *11 (N.D.N.Y. April 15, 1999) (discussing New York State’s treatment of Cayuga Indians).

the procedural stance is functionally the same as in a suit brought simultaneously by the United States and the tribe.

A more interesting question arises where a tribe has sued a state and the United States later intervenes and also asserts claims against the state. In this situation, the state might seek dismissal of the tribe's claim on the ground that the court never originally had jurisdiction over that claim. If the state has omitted to raise a sovereign immunity challenge prior to the United States' assertion of its own claim against the state, the state's contention should fail since the question of sovereign immunity need not be considered until it is pressed by the state²⁹¹—at which point the proceeding is functionally similar to one brought simultaneously by the federal and tribal plaintiffs.²⁹²

Even if the state raised its immunity claim prior to the United States' intervention, however, it should prove no more successful. When an original plaintiff's suit is dismissed for lack of jurisdiction, the court has discretion to retain an intervenor's pleading and treat it as a separate action.²⁹³ Thus, the United States' complaint could still proceed—and the tribal plaintiff could then seek intervention in the United States' action to assert its claims²⁹⁴ against the state.²⁹⁵ Given that the tribal

291. See *Wisconsin Dep't of Corrections v. Schacht*, 118 S. Ct. 2047, 2052 (1998).

292. To the extent that a court might reason that dismissal would be warranted due to the initial lack of jurisdiction, under the analysis explained below the court should nonetheless not dismiss the tribe's complaint.

293. See *Mille Lacs Band v. Minnesota*, 124 F.3d 904, 913 (8th Cir. 1997); *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990) (citations omitted) (quoting 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE* § 1917, at 458-59 (2d. ed. 1983)).

294. A dismissal on jurisdictional grounds is not on the merits, see *FED. R. CIV. P.* 41(b), and accordingly, dismissal on the basis of state sovereign immunity has no res judicata effect. See, e.g., *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188 (5th Cir. 1986). Although the Court has not yet decided whether state sovereign immunity is a matter of subject matter jurisdiction or of personal jurisdiction, see *Schacht*, 118 S. Ct. at 2054 (observing that the question is undecided with respect to Eleventh Amendment immunity); *id.* at 2055 (Kennedy, J., concurring) (noting similarities to both subject matter jurisdiction and personal jurisdiction), both sorts of jurisdictional dismissals are without prejudice under Rule 41(b). See 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 4436, at 344 (1981). And while a dismissal on jurisdictional grounds will bar relitigation of the particular jurisdictional issue decided, see *id.* at 340, this rule is inapplicable here because a suit by the federal government, in which a tribal plaintiff intervenes, presents a different state sovereign immunity question than a suit by the tribal plaintiff alone.

295. Thus, in one of the *Seneca* cases the court held that a tribe's claims against a state could proceed even though the United States did not seek to intervene in the action until after the state had raised its Eleventh Amendment defense against the tribe's claims. See *Seneca Nation v. New York*, 26 F. Supp.2d 555, 564-65 (W.D.N.Y. 1998)

plaintiff's claims could thus be heard nonetheless, efficiency counsels that the court refuse to dismiss those claims once the United States has sought to intervene.²⁹⁶

B. Can a Tribe Bring Additional Claims and Seek More Extensive Relief?

Arizona suggests that a tribal plaintiff may assert claims that differ from those of the United States, so long as the tribal claims arise from the same transaction as the United States' claims. Likewise, although it is not clear to what extent a tribal plaintiff can ultimately recover damages in an amount greater than is sought by the United States, it is well established that tribal plaintiffs can seek such relief as an initial matter.

One of the reasons that the Court granted the Tribes' request to intervene in *Arizona* was that "the United States' action as their representative will bind the Tribes to any judgment."²⁹⁷ A state that defends against tribal claims asserted by the federal government will likely claim in any later litigation that claims by the tribe that arise out of the same transaction or series of related transactions are barred by the doctrine of claim preclusion.²⁹⁸ There is consequently a certain symmetry to the Court's reasoning that the states involved in the *Arizona* case "no longer may assert [sovereign] immunity with respect to the subject matter of this action."²⁹⁹ Thus, at least one court has read *Arizona* to establish that "new claims or issues' may be raised [by the tribal plaintiff] so long as those issues or claims encompass the same subject matter as the original claims or issues [asserted by the United States]."³⁰⁰

(holding that since the tribal plaintiff "would still be entitled to intervene in the United States' case" if its own case were dismissed, "[t]he interest of judicial economy is best served by allowing the Senecas' claims to continue"); see also *Mille Lacs Band*, 124 F.3d at 913 (fact that the United States was merely a plaintiff-intervenor was "not controlling" for Eleventh Amendment purposes).

296. *Arizona* itself demonstrates the propriety of this outcome. The claims that the Tribes were permitted to assert in *Arizona* were initially raised by the Tribes and only belatedly asserted by the United States, and by the time intervention was granted no other issues remained to be determined.

297. *Arizona v. California*, 460 U.S. 605, 615 (1983).

298. See *supra* note 255.

299. *Arizona*, 460 U.S. at 614.

300. *Cayuga Indian Nation v. Cuomo*, Nos. 80 CV-930 & 80-CV-960, 1999 WL 509442, at *13. The court in *Cayuga* noted that "at the same time the *Arizona* Court stated that '[t]he Tribes [were] not seek[ing] to bring new claims or issues against the state,' it recognized that in the Tribes' motion to intervene they made 'claims for additional water rights to reservation lands.'" *Id.* (quoting *Arizona*, 460 U.S. at 612)

Whether or not tribal plaintiffs can assert additional claims, it is clear that they can request more extensive relief than the United States seeks. In *Arizona*, if the Court's concern had been that the Tribes seek no greater relief than the United States, it plainly would not have approved the Special Master's grant of intervention, for the Tribes' requests in almost all instances exceeded those of the federal government.³⁰¹

C. Are There Special Pleading Requirements?

If a tribal plaintiff may seek more extensive relief than its federal co-plaintiff does, then *a fortiori* state sovereign immunity does not require that the pleadings of the federal and tribal plaintiffs be identical. But even apart from the tribe's ability to seek greater relief, the principles of notice pleading make clear that the tribe's complaint need not be confined to the relief demanded in the United States' complaint.

While the Federal Rules require that a party's pleading include "a demand for judgment for the relief the pleader seeks,"³⁰² they also provide that "[e]xcept as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."³⁰³ Thus, "[a] party's recovery is limited to the amount prayed for in its demand for judgment only in cases where judgment is entered by default,"³⁰⁴ and a plaintiff "need not set forth any theory or demand any particular relief for the court will award appropriate relief if the plaintiff is entitled to it on any theory."³⁰⁵ "If a pleading provides a defendant notice of the plaintiff's claims and the grounds for the claims, omissions in a prayer for relief do not bar redress of

(alterations in original); *but see* *Seneca Nation v. New York*, 178 F.3d 95, 97 (2d Cir. 1999) (per curiam) (stating in dictum that "the State of New York retains its Eleventh Amendment immunity to the extent that the Seneca Nation of Indians or the Tonawanda Band of Seneca Indians raise claims or issues that are not identical to those made by the United States"), *cert. denied*, 2000 WL 11856 (Jan. 10, 2000).

301. See *supra* notes [166-67] and accompanying text.

302. FED. R. CIV. P. 8(a)(3).

303. FED. R. CIV. P. 54(c).

304. *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 683 (2d Cir. 1993) (rejecting contention that jury award should be reduced because it exceeded amount demanded in original complaint).

305. *Gilbane Bldg. Co. v. Federal Reserve Bank*, 80 F.3d 895, 900 (4th Cir. 1996) (quoting *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24-25 (4th Cir. 1963)).

meritorious claims.”³⁰⁶

These principles reflect, among other things, the recognition that a party will not necessarily know, when initiating a claim, precisely what the evidence will show or what will be the most appropriate relief. In joint federal-tribal litigation, this uncertainty would raise problems if sovereign immunity issues turned on the relief sought by each plaintiff at the outset. Private litigants may quite properly resolve uncertainty by claiming all relief to which they anticipate they could conceivably demonstrate a viable claim.³⁰⁷ By contrast, the federal government—out of concerns over scarce litigation resources³⁰⁸ or the like—may omit from its prayer for relief components that, as the litigation progresses and the evidence unfolds, it may later wish to claim on the tribe’s behalf.³⁰⁹

Thus, the fact that a tribe’s pleading requests more or different relief than the pleading filed by the United States should be irrelevant.

D. Who Can Make What Arguments?

One of the key principles underlying *Arizona* is that Indian tribes must be allowed to “participat[e] in litigation critical to their welfare.”³¹⁰ Inherent in meaningful participation is the ability to make arguments and present evidence not put forward by the federal trustee.³¹¹ Thus, courts should place no abnormal

306. *Pension Benefit Guar. Corp. v. East Dayton Tool & Die Co.*, 14 F.3d 1122, 1127 (6th Cir. 1994) (citations omitted).

307. For instance, under the Federal Rules it is permissible to include in a complaint allegations that presently lack evidentiary support, so long as the attorney filing the complaint can certify that such allegations “are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” FED. R. Crv. P. 11(b)(3).

308. Once the federal government sues a state on a tribe’s behalf, it has met the *Alden* Court’s requirement that the United States place its resources behind the claim against the state. To require in addition that the United States seek, from the outset, each specific aspect of relief that a tribe requests would be to strain the Court’s reasoning beyond any practical purpose. If a claim is important enough to prompt the United States to sue a state, it is important enough to warrant a court’s consideration of all valid forms of relief, including those pressed initially by the tribe alone.

309. Although courts will refuse to grant belatedly requested relief where its award would be unfairly prejudicial, *see, e.g.*, *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975), it is hard to imagine prejudice arising in the context addressed here, where the very basis for the state’s challenge would be that the tribe has given notice, in its own pleading, that it seeks different or more extensive relief than that sought by the federal government.

310. *Arizona v. California*, 460 U.S. 605, 615 (1983).

311. As discussed in Part IV.B.2. above, the tribe’s ability to supplement the United

limitations on a tribe's advocacy of claims it presses in common with the United States.

Obviously, this is not to say that *Arizona* intervention will lead to a litigation free-for-all. Just as in any other case, the district judge has the ability to oversee the course of discovery,³¹² protect the parties from unreasonable demands,³¹³ maintain control of pretrial proceedings³¹⁴ and guide the conduct of the trial.³¹⁵ The trial judge's authority to structure the proceeding, coupled with the fact that an *Arizona* intervenor's claims against a state will arise from the same transaction(s) as the claims brought by the United States,³¹⁶ will ensure that the presence of the *Arizona* intervenor creates no undue litigation burdens.

E. Does it Matter That a Tribe Might Appeal Even If the United States Does Not?

A state defendant might contend that, if the federal government does not appeal from a judgment, an appeal by a tribe³¹⁷ will offend state sovereign immunity. Arguably, neither

States' presentation not only benefits the tribe, and the accurate presentation of the issues, but also aids the United States in fulfilling its trust responsibility to the tribe.

312. See, e.g., FED. R. CIV. P. 26(b)(2) (court may limit unreasonably cumulative or duplicative discovery); FED. R. CIV. P. 26(d) (upon motion, and for the convenience of parties and witnesses and in the interests of justice, the court may set parameters for the timing and sequence of discovery).

313. See, e.g., FED. R. CIV. P. 26(c) (where movant shows good cause, court may issue orders to protect a party from, *inter alia*, undue burden and expense arising from discovery requests).

314. See, e.g., FED. R. CIV. P. 16 (court may hold pretrial conferences to establish and maintain control of pretrial proceedings).

315. See, e.g., FED. R. EVID. 403 (relevant evidence may be excluded if its probative value is substantially outweighed by, *inter alia*, "considerations of undue delay, waste of time, or needless presentation of cumulative evidence"); 2 WEINSTEIN'S FEDERAL EVIDENCE § 403.06[1] at 403-60 (Joseph M. McLaughlin, gen. ed., 2d ed. 1999) ("[T]rial judges have wide discretion to exclude [cumulative evidence] so they may conduct trials efficiently.").

316. Thus, the relevant evidence will be overlapping if not identical, and its presentation can be structured, with the guidance of the court, so as not to prolong unduly the proceedings. By contrast, presentation of a claim that is entirely factually unrelated to the United States' claims would be more likely to expand the scope and length of the proceedings to an extent that could raise legitimate concerns.

317. See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987) ("An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court."); see also 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3902.1, at 109 & n.13 (2d ed. 1991) (citing *Stringfellow*).

functional concerns³¹⁸ nor relevant doctrines³¹⁹ support such a

318. If a case is important enough for the United States to litigate it to conclusion at the level of the district court, the United States' decision not to commit resources to an appeal should not be taken as a sign that the case is low priority. At the district court level, the question of resources is essentially a financial one, and a plausible argument can be made that the Framers were cognizant of this limitation when they crafted the Constitution. After all, it was readily apparent during the early days of the Union that the United States' powers of enforcement through litigation would be limited by the scarcity of its funds. On appeal, however, the impact on the United States' litigation budget is likely to be less, and the more pressing question will be whether the United States is willing to seek appellate attention on the matter at hand, possibly at the expense of securing appellate scrutiny of other matters. This consideration, unlike the financial concern, is unlikely to have been part of the Framers' calculus, since the Framers presumably did not anticipate the present scope of substantive federal law, the concomitant profusion of federal statutes and enforcement agencies, or the resulting number of cases in which the federal government would wish to seek appellate review. Accordingly, it is unlikely that the states, in consenting to suit by the United States, would have relied on the concept that the federal government would be self-limiting in the number of matters which it chose to appeal.

Moreover, even if the United States' failure to appeal is instead a response to political concerns, this should not mean that the appellate courts should be divested of their ability to hear the appeal. A state's interest in retaining the benefit of an incorrect district court decision is flimsy compared with the interest of the federal system in the uniformity and correctness of federal law.

319. For instance, there is some doctrinal support for the view that the Eleventh Amendment does not apply to appellate proceedings. "[A] State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2226 (1999) (citing *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900)). But it is well settled that the Supreme Court can review the judgment of a state's highest court, "even when a State is a formal party [defendant] and is successful in the inferior court," because the proceeding before the Supreme Court "is not a suit within the meaning of the [Eleventh] Amendment." *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 27 (1990) (quoting *General Oil Co. v. Crain*, 209 U.S. 211, 233 (1908) (Harlan, J., concurring)).

Of course, Supreme Court review of state-court judgments presents issues distinct from those raised by intermediate appellate review of federal district court judgments; but the doctrine that the Supreme Court can review state-court judgments in cases involving states has its roots in "a time when individual litigants could invoke review in the Supreme Court as a matter of right." James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. REV. 161, 226 (1998)—a pedigree which suggests the two contexts may share a greater similarity than is at first apparent. See *id.* at 225 ("One has difficulty in seeing how the Eleventh Amendment could simultaneously leave untouched the Court's own exercise of appellate authority and curtail all other federal appellate power.").

The concept that an appeal is not a "suit" within the meaning of the Amendment has been subject to criticism, particularly by proponents of the "diversity" theory. See *supra* note 28. As Justice Souter has observed, "[w]hether or not an appeal is a 'suit' in its own right, it is certainly a means by which an appellate court exercises jurisdiction over a 'suit' that began in the courts below." *Seminole Tribe*, 517 U.S. at 113 n.10 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). Likewise, in the leading discussion of the issue, Professor Jackson has offered reasons why "the proposition that a 'suit' does not include an 'appeal' is only barely plausible." Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*,

position. But at any rate, states should not be able to avoid *Arizona* intervention merely by raising the specter of such an appeal. The possibility that a tribe might take an appeal in which the United States did not join³²⁰ raises no more of an issue than does the possibility that the United States might decide, part-way through the litigation, to drop its claim.³²¹ In either event, the state can raise its argument once the tribe is on its own; but until then, hypothetical scenarios provide no basis for barring a tribe's claim. (If the contrary were true, it would not have been proper for the Special Master to have permitted the Tribes to intervene in *Arizona*, for although *Arizona* was an original proceeding in the Supreme Court, the parties could and did take exception to the Supreme Court from the determinations of the Special Master, a process little different in function from taking an appeal from the determinations of a

98 YALE L.J. 1, 32 (1988). These critiques, however, appear to presume the validity of the diversity theory, for if instead, as the majority of the Court believes, state sovereign immunity is a constitutional bar to federal question suits against states, then the conclusion that an appeal is a "suit" would prevent Supreme Court review of numerous state-court decisions on federal questions. Notwithstanding that the diversity theory is considerably more plausible than the current Court's account, the latter is the law of the land, and it provides litigants with a basis on which to argue that appeals are not barred by state sovereign immunity.

320. On a practical note, in such event the tribal appellant should ask the appellate court to vacate the dismissal of the United States' claims as well as the tribe's. Although an appellant normally lacks standing to assert the rights of co-parties, courts have recognized exceptions where there is a particularly close relationship between the appellant and the other party. Moreover, an appellate court has the power to afford relief to a non-appellant if necessary in order to grant effective relief to the appellant. See, e.g., *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 468 n.2 (9th Cir. 1984) ("The Levins have standing to contest the grant of the preliminary injunction issued against the other defendants, even though those defendants have not appealed Even if the injunction is vacated as to the Levins, an injunction in effect against the Superior Court, the Sheriff, the Clerk, and the Marshall leaves the Levins powerless to enforce their state court judgment."); see also 15A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3902, at 73 & n.16 (1992) (citing *Goldie's Bookstore*). In cases where the *Arizona* doctrine is the tribal plaintiff's sole means of avoiding state sovereign immunity problems, effective relief to the tribal appellant will require the reinstatement of the United States' claims as well. Cf. *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986) (allowing Maine—which had intervened below because the federal crime involved a state statute—to appeal and seek reinstatement of the guilty plea in a federal criminal case in which the United States dismissed its appeal from the reversal of the defendant's guilty plea); *Sanguine, Ltd. v. United States Dep't of Interior*, 798 F.2d 389, 390-91 (10th Cir. 1986) (after United States consented to decree enjoining enforcement of a rule adopted by the Bureau of Indian Affairs, nine Native Americans intervened to defend their interests in the rule's enforcement; court held that "this case presents a unique situation in which prejudice to the intervenors can be avoided only by setting aside the prior judgment and allowing the opportunity to litigate the merits of the case").

321. See *supra* note 255.

lower court.)

CONCLUSION

The discussion above makes clear that some tensions may arise, in the context of *Arizona* intervention, between the United States' interest in maintaining control of the litigation and a tribal plaintiff's efforts to protect tribal interests. Under the *Arizona* doctrine, a tribal plaintiff arguably can assert additional claims relating to the same transaction sued upon by the United States and can seek additional relief. The tribe may also make arguments that differ from those made by the United States. And if the United States decides not to appeal an adverse judgment, the tribal plaintiff may attempt to do so in its stead.

Such tensions, however, do not mean that a tribal plaintiff's intervention offends state sovereign immunity. Participation by a tribal intervenor should aid the United States in fulfilling its trust obligations to the tribe by allowing the tribe to monitor and supplement the United States' presentation of claims and issues. Moreover, while a tribal intervenor can affect the course of the litigation in important ways, the United States always has the option of seeking to dismiss its own claims. To the extent that the *Arizona* doctrine provides the sole basis for a tribe's assertion of claims against a state defendant, the United States' power to dismiss its own complaint gives it veto power over the tribal claims. Concededly, the United States' dismissal of its claims is constrained by the federal trust responsibility, but that fact does not affect the *Alden* analysis. Rather, if fiduciary responsibilities narrow or eliminate the United States' discretion to seek dismissal of its claims when a tribal intervenor is a party to the suit, the same responsibilities would apply to a suit by the United States alone. In sum, participation by a tribal intervenor does not diminish the United States' ultimate discretion to guide the course of the suit, and thus it presents no problem under *Alden*.

Consequently, courts' long-standing practice of permitting *Arizona* intervention by tribal litigants should continue undisturbed by the Court's current vision of state sovereign immunity. Though the Court's recent decisions have extended state sovereign immunity far beyond the textual limits of the Eleventh Amendment and will, in the view of many, create significant and unwarranted problems in the enforcement of federal laws, in the particular context of tribal intervention in

federal suits against states the *Alden* Court's analysis merely reinforces *Arizona*'s continued viability.

